Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-1042

MAURICE L. SILVER, M.D., et al.,
Petitioners,

v.

THE QUEEN'S HOSPITAL, aka QUEEN'S MEDICAL CENTER, a Hawaii non-profit corporation, et al., Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, and APPENDICES "A" TO "I"

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. _____

MAURICE L. SILVER, M. D., ELIZABETH BOWMAN, LINDA Y. GISHI, MAMORU OISHI, CLARENCE M. KANE, WILLIAM J. GOULD, ROBERT M. PYLE, REBECCA M. MIN, EUGENE C. CLARK, SYLVIA L. FREY, JOHN F. FREY, DOLORES LUIS, DIONICIO C. LUIS, FREDDIE M. HARPOLE, DOROTHY HARPOLE, HERBERT KEALOHA and SHIRLEY ANN K. KEALOHA,

Petitioners,

vs.

THE QUEEN'S HOSPITAL, aka QUEEN'S MEDICAL CENTER, A Hawaii non-profit corporation, SAINT FRANCIS HOSPITAL, a Hawaii non-profit corporation, KUAKINI HOSPITAL, a Hawaii non-profit corporation, CASTLE MEMORIAL HOSPITAL, a Hawaii non-profit corporation, JOHN J. LOWREY, M. D., RALPH B. CLOWARD, M.D., THOMAS S. BENNETT, M.D., WILL J. HENDERSON, E.E. BLACK, J. GARNER ANTHONY, DENNIS E. W. O'CONNOR, THOMAS

M. WADDOUPS, A. L. Y. WARD,)
ALLEN C. WILCOX, JR., KENNETH)
R. NURSE, WILLIAM E. AULL,)
NATHAN F. BANFIELD, 3rd, MOR-)
TOR E. BERK, M. D., KENNETH F.)
BROWN, CARTER GALT, DOUGLAS)
S. GUILD, WILLIAM C. KEA, K. J.)
LUKE, MALCOLM MacNAUGHTON,)
ALEX SMITH, F. J. PINKERTON,)
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LAWRENCE H. GORDON, M. D.,)
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KENJI GOTO, HIDEO KAWANO,)
HARRY M. TAGAWA, THEODORE T.)
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SAMUEL Y. SASAI, HOWARD K.)
HIROKI, CLYDE K. SHIMADA, TERUO)
HIMOTO, HENRY DAMON, MITSUYO-)
SHI FUKUDA, SHINSUKE NAKAMINE,)
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HENRY CHUN HOON, KENNETH S.)
SHIOI, J. I. FREDERICK REPPUN,)
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GABRIEL MA, M. D., ROBERT A.)
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A. G. STREIFLING, M. O. CHANG,)
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RICHARD CLEMENT, HAROLD)
KONO, FRANK McMURRY, GILBERT)
PLUBEL, PERRY SUMIDA, M. D.,)

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TER ZANE, RAYMOND DeHAY, M. D.,)
JAMES L. ERICKSON, M. D., KEN-)
NETH W. MOMEYER, M. D., PAUL)
Y. TAMURA, M. D., PHILIP S.)
ARTHUR, M. D., RICHARD D.)
MOORE, M. D., ROGER B. BRAULT,)
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INSURANCE COMPANY, ROYAL)
INDEMNITY COMPANY, ARGONAUT)
INSURANCE COMPANY, LIBERTY)
MUTUAL INSURANCE COMPANY,)
WALTER B. QUISENBERRY, M. D.,)
individually and as Director of Health)
of the State of Hawaii Department of)
Health; TOMIC T. TOMSON, indivi-)
dually and as Administrator of Maui)
Memorial Hospital; and JOHN F.)
MORRIS, M. D., Individually and as)
Chairman of the Credentials Commit-)
tee, Maui Memorial Hospital,)
)
Respondents.)
)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Petitioners, an American Board certified Neurological Surgeon, Neuropathologist, and qualified Electroencephalographer and 16 citizens who hire his special services and rely upon his

expertise as a physician and medical expert witness, pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Ninth Circuit, entered on October 24, 1975. Petitioners were thrown out of court for alleged failure to meet the requirements of Rule 8(a), Federal Rules of Civil Procedure in a complex case in which all discovery was stayed by court order.

OPINIONS BELOW

The complaint filed September 8, 1970, was dismissed with leave to amend by Judge Boldt (Washington), a District Court Judge assigned after both Hawaii District Court Judges were disqualified upon motions by Petitioners, and after hearings and debate. Judge Boldt's decision is published at Silver et al. v. The Queen's Hospital, et al., 53 F.R.D. 223 (D. Haw. 1971).

Judge Boldt accepted the complaint and assigned the complaint to the procedure of the Manual for Complex and Multidistrict Litigation. Judge Boldt, on June 30, 1971, dismissed the complaint on the ground it did not contain aver-

ments that were simple, concise and direct (Rule 8[a][1]) and ordered an amended complaint.

Thereafter, President Nixon appointed Judge Boldt Chairman of the Pay Board. The case temporarily was assigned to Judge Walsh (Arizona).

Judge Walsh ruled the First Amended Complaint failed to comply with Rule 8(a)(1) and ordered an amended complaint (R. 2311-2312). Judge Walsh withdrew and the case was assigned to Judge Smith (Montana).

Judge Smith dismissed the second amended complaint with leave to file a third amended complaint on February 20, 1973. A copy of Judge Smith's Order is attached hereto as Appendix "C".

Judge Smith dismissed the third amended complaint on July 23, 1973, with leave to file an amended complaint by the neurosurgeon, Maurice L. Silver, M.D., only. Appendix "D".

Judge Smith dismissed the fourth amended complaint on September 4, 1973, without leave to amend as to any of the petitioners. Appendix "E".

The Court of Appeals, Ninth Circuit, affirmed

and in an accompanying unpublished memorandum (Appendix "A"), stated that the judicial "patience was exhausted" as justification for the ultimate dismissal without leave to amend.

In the course of these attacks on the complaints, the complaints were accepted in that certain issues were attacked as being without merit and ultimately all of the patients' claims were dismissed on the merits. During all that time, all discovery was stayed by order of the court (R. 3173). A motion for a Rule 54(b) order was made and denied and/or disregarded and the last amended complaint by the neurosurgeon only was dismissed without leave to amend.

Petitioner filed a petition for rehearing with suggestion for rehearing en banc. On October 24, 1975, the Court of Appeals, Ninth Circuit, denied the rehearing and rejected the suggestion for a rehearing en banc. Appendix "B".

JURISDICTION

Jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Was it an abuse of discretion and a deprivation of due process in violation of Amendment V as well as discriminatory to strike the complaints after the complaints had been assigned to and subjected to the procedure set forth in the Manual for Complex and Multidistrict Litigation upon the alleged ground the complaints were not short and plain statements of claim?

2. Did the courts below erroneously construe and apply Rule 8(a) so as to deprive the Petitioners of their right to petition the government for a redress of grievances in violation of Amendment I, as well as deny them due process of law in violation of Amendment V, and enforce involuntary servitude against them in violation of Amendment XIII?

3. Where a complaint is submitted to the procedure set forth in the Manual for Complex Litigation, and an order is entered staying all discovery, are Petitioners denied due process of law in violation of Amendment V when the court grants summary judgment and dismisses Peti-

tioners' claims as without merit?

4. Where the existing decisions of the Circuit Courts of the Court of Appeals demonstrate the judges of said courts are in hostile and fierce judicial debate as to the interpretation and application of Civil Rights (42 U.S.C., Sections 1983, 1985, and 2000a) are petitioners deprived of due process of law in violation of Amendment V when the Ninth Circuit rejects the construction placed on the same law and applied by this Court and the Fourth and Fifth Circuits to the prejudice and detriment of the Petitioners?

5. Where state laws are so designed, construed and applied as to delegate the police power of the state (licensing power) to hospital corporations and their incumbent medical staffs, their medical malpractice insurers and their defense law firms and said laws are challenged as unconstitutional, is jurisdiction properly in a statutory Three-Judge Court?

6. Where it is shown that two or more persons in a state conspired, either directly or indirectly for the purpose of depriving a person

or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of a State from giving or securing to all persons within such State the equal protection of the laws, has a violation of 42 U.S.C., Section 1985, been shown of which Federal Courts must take jurisdiction?

7. Where some identified corporations engaged directly and indirectly in interstate commerce combine with physicians and lawyers who are also engaged in interstate commerce and together act in collusion to control the practice of medicine, fix prices and allocate the market in interstate and foreign commerce in the business of medical and hospital services and medical expert testimony, is such combination a restraint of trade and a violation of the Sherman Act?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The constitutional provisions involved are Amendments I, IV, V, VII, VIII, XIII, and XIV, to the Constitution of the United States. The sta-

tutes involved are 15 U.S.C., Sections 15, 26; 18 U.S.C., Sections 241, 242, 371, 1621, 1622; 28 U.S.C., Sections 2281; 2284; 42 U.S.C., Sections 291, 1981, 1982, 1983, 1985, 1986, 2000a, and 2000d. The rules involved are Rules 8(a), 23(a), and 54(b), Federal Rules of Civil Procedure.

The constitutional provisions, statutes, and rules involved are printed in Appendix "H", infra.

STATEMENT OF THE CASE

Petitioners are a neurological surgeon and 16 of his patients. Their complaint and four amended complaints have been stricken and they have been denied any and all relief in a case that was determined to be a complex case and subjected to the procedure prescribed by the Manual for Complex and Multidistrict Litigation (R. 486).

During the time from September 8, 1970, to the final order, all discovery has been stayed, except for a limited discovery relating to a disqualification motion of defense lead attorneys.

On September 8, 1970, plaintiffs filed their original complaint seeking redress of their grie-

vances according to the Sherman and Clayton Acts and the Civil Rights laws, together with the Application for Statutory Three-Judge Court; Affidavit of Disqualification and recusal of the resident Hawaii U.S. District Court judges; Motion for Preliminary Injunction; Certificate of Good Faith of the attorneys, and a Memorandum of Law, pointing out the necessity for convening a three-judge court (R. 1-161).

Plaintiffs, by their verified complaint made out a case calling for a three-judge district court made up of judges who were not residents of the State of Hawaii. The complaint showed how the police power of the State of Hawaii, through legislative and court action, in matters affecting public health and the administration of justice, had been passed into the hands of defendants. It showed how defendants, acting under color of state law without constitutional restraints, tyrannically and arbitrarily obstructed the delivery of medical care in Hawaii and tampered with the administration of justice in the state and federal courts on plaintiffs in particular and the public in

general.

There were 94 defendants and in order to plead a case against each, it required several pages to plead sufficient facts to show their complex interlocking relationship and concert in action and collusion.

The State of Hawaii has nowritten rule, regulation or legislation relating to the practice or licensing of surgical specialists.

> "Every physician or surgeon in the State of Hawaii, O'Connor said, has the same license, regardless of his specialty or his particular ability in certain areas of medicine.
>
> "As far as the practice of individual specialties in Hawaii, the only system that protects the citizens of this state today is the system established and run by the hospitals, O'Connor said." (R. 1352.)

The complaint shows a lawless pattern of practice for more than 10 years in as short and plain a statement as possible. The complaint shows that defendants, armed with state police power determine which physician will be allowed to practice in the defendant Hill-Burton hospitals along racial, religious and national origin lines,

and which physicians will be protected from claims of medical malpractice by the victims of said medical malpractice through control of the Medical Practices Committee of the Medical Society. See R. 1856.

The pleading shows the patients had selected a truly competent, highly skilled, exceptionally well-trained specialist (R. 26-33), and that "he has been discriminated against because of his religion as he is the only neurological surgeon in the private practice of medicine of the Jewish Faith in the State of Hawaii." (R. 61.)

The complaint sets out jurisdictional allegations of the three-judge court act, the equal protection of the law violations, and the violations of the Sherman and Clayton Acts, not as conclusions, but as facts. The facts show a ten-year pattern of practice that was unreasonable, arbitrary and invidiously discriminatory against the plaintiffs and that the plaintiffs were treated differently than others under similar circumstances and conditions. See R. 61.

Plaintiffs alleged the statutes involved and as

construed and applied were part of the legislative action that unconstitutionally delegated the police power of the State to the defendants, who carried on as a secret police force in the specialized fields of medical care. Paragraphs 56-67 at pages 68-74 of the complaint contain the required allegations that the statutes are unconstitutional for a multitude of good and sufficient reasons substantial in nature and sufficiently debatable to require a three-judge court (R. 152). These allegations are summarized in headnotes in the Table of Contents at R. 10-11. This Table of Contents prefaces the complaint. In short paragraphs the Table of Contents succinctly sets forth the essentials of the claims asserted in this complaint of 103 pages. The Table of Contents is cross-referenced as to page and numbered paragraphs of the complaint.

It was alleged that the State through its legislature had allegedly set up a department of health to implement the Acts of Congress (42 U.S.C., Secs. 291, et seq.) "to make all types of hospital and medical facility services reasonably

accessible to all persons in the State" (Sec. 323-17, H.R.S.). It was alleged that the defendants, in carrying out their secret police power in matters of public health, had set The Queen's Hospital up as "the hub" or "Sun" of "the system of 'satellite' hospitals . . . and through said system the defendants by this combination and conspiracy control the peer committees of the 'Sun' hospital." (R. 79.)

It was alleged that this combination, armed with this secret police power, "act together to enforce the conspiracy of silence" (R. 79) in state and federal courts.

The insurance agents O'Connor, Waddoups and Anthony were the legal advisers to the peer committees of the "Sun" hospital "and in August 1966" while they were Dr. Silver's lawyer, they became the legal advisers "to the satellite hospital, Defendant Castle Memorial Hospital" and combined with the other defendants to discriminate against their own client, Dr. Silver, and deprive plaintiffs Freys and others of fair trials in Hawaii.

Defendants, it is alleged, are able to obstruct the administration of justice in state and federal courts in Hawaii (R. 60-63).

It is alleged that the defendants compel the patients herein to either forego their right to have the services of their duly licensed physician in whom they have great trust and confidence or be evicted from said hospitals or arbitrarily compelled to take the services of a defendant doctor (R. 781, R. 1895-1897, Affidavit of Herbert Kealoha).

This power permits defendant insurance companies and their customers and agents, defendants herein, acting in concert to boycott the advertisement, sale, delivery and use of the "Dr. Silver Four-Way Stopcock" (R. 30, 576) and to unreasonably burden interstate commerce by compelling patients to use crowded airlines and congested national highways to travel to hospitals that are distant from their homes and away from their resident island in order to have the services of their selected medical specialists (R. 91-96). This is a hazard to life and the danger of delay

can and does cause extreme hardship, undue suffering and, at times, irreversible injury and death. See Vol. 14, October 10, 1971, for an example.

Since all specialists must be trained outside the State and District of Hawaii, the defendants are allowed to regulate and control the movement of specialists to Hawaii. The defendants have never invited a Jew or Negro who is a neurosurgeon, to come to Hawaii. These defendants acting in concert control and determine what specialist will be invited to Hawaii to work in the established physician corporations and partnerships with the automatic right to use of the facilities of the defendant hospitals while they are immune to the one-year licensure (R. 35-37 and R. 58-59). The defendants are permitted to harass and to force competent independent specialists to abandon or leave Hawaii (R. 64), with the result that the patients of the specialist forced to leave Hawaii must submit to the services of the defendant physicians or their partners

or fellow stockholders.

The medical malpractice insurance companies and their lawyer-agents and customers (defendants) are permitted to protect the medical malpractice repeater and to continue such medical malpractice repeater as a member of the "peer review committees" and a cash paying customer in the medical malpractice insurance industry (R. 59-61).

The complaint shows that the State of Hawaii confers immunity upon the secret police in the peer committees if "(1) the member was authorized to perform in the manner in which he did; and (2) the member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted." (Sec. 663-1, H.R.S.).

The insurance agent defense lawyers intimidate, oppress and destroy a medical expert witness such as plaintiff, Dr. Silver, and thereby impede and impair the administration of justice in the State and Federal courts in Hawaii all as illustrated by the deposition of Martin Pence,

Chief Judge of the U.S. District Court, District of Hawaii (R. 539-568), taken at the written request of Chief Judge Pence on March 2, 1971, in the case of Silver v. Gordon, Civ. No. 27429, First Circuit Court, State of Hawaii.

Chief Judge Pence explained how he was encouraged to believe that Dr. Silver had an unsavory or bad reputation as a medical expert witness by the lawyers from the medical malpractice defense lawfirms and insurance claims adjusters.

> "I say 'most crooked assed' because of a statement made to me in discussing Dr. Silver's reputation sometime before by Gene Beebe when he said of Dr. Silver that Dr. Silver was smart and that made him a dangerous man because he was a crooked assed son of a bitch." (R. 551.)

Chief Judge Pence gathered this "reputation" of Dr. Silver "From discussion with attorneys" (R. 553) "And I think maybe a claims adjuster or two." (R. 254).

Chief Judge Pence had discussed this alleged "reputation" with defendant Dr. Lawrence H. Gordon sometime in 1966 or at least before

March 15, 1967, in the Outrigger Canoe Club Waikiki, Honolulu, Hawaii, at a private luncheon (see R. 123-125, Affidavit of Disqualification).

It was known at the time the original complaint was drafted that defendants had used the extra-judicial statements of Chief Judge Pence at a closed meeting of the Castle Hospital "peer review committee" against Dr. Silver and Sylvia and John Frey and others. The Freys had a malpractice case pending in the State of Hawaii against defendant, Dr. H. William Goebert and others.

Plaintiffs asked that both resident judges be disqualified. Both local judges resisted disqualification. Plaintiffs sought a writ of mandamus as to Chief Judge Pence. The Court of Appeals assigned Hon. Bruce R. Thompson, U.S.D.J., Reno, Nevada, to hear the disqualification. Chief Judge Pence was ordered disqualified after hearing by Hon. Bruce R. Thompson on January 8, 1971 (R. 311).

Judge Tavares did not recuse himself. He

assigned the case to Hon. George H. Boldt, U.S. D.J., Tacoma, Washington, "for the hearing and disposition of such matters in said case as may properly come before him during the period of his said assignment." (R. 306.)

Judge Boldt decided:

> "THE COURT: I propose--unless someone objects--to advise Judge Tavares, today, of the ruling that I have made . . . namely, that as far as presenting this recusement motion to me is concerned, I have denied it; but on the ground that it is his responsibility to make a ruling upon it, in the first instance. That is what I propose to tell him . . . "

The disqualification of the local federal judges pursuant to law appeared to be imperative and the only course open to plaintiffs. The best impartial or corroborated way to explain this seems to be by referring to the words used by Judge Tavares when he withdrew:

> ". . . especially where the possible issues are claimed to be numerous, important and the law thereon unsettled and if the plaintiffs' claims be sustained, would affect many persons and institutions throughout the entire state." (R. 393.)

Judge Tavares ordered all discovery stayed

(R. 215) and continued the order staying all discovery before he assigned the case to Judge Boldt (R. 390).

Thereafter on March 8, 1971, Judge Boldt entered a preliminary order (R. 486) wherein he determined among other things:

> "On the record it appears this is a complex case and, as stated at the January 15th hearing, all proceedings prior to trial will conform to those recommended in the MANUAL FOR COMPLEX AND MULTIDISTRICT LITIGATION unless counsel propose particular deviations which the Court approves."

Judge Boldt heard motions to strike the complaint on April 23, 1971 (Tr. Vol. 13). Mr. Hayden C. Covington, one of plaintiffs' attorneys, in the course of oral argument, respectfully addressed the court, and in part, said:

> "So it depends on the nature of the case, and we have got a case here that has extended over a period of ten years, and I say to anybody, how can you put a gallon in a thimble, that's what I told Joe Ryan and I still stand flat-footedly on that statement. We have got to get our facts before the Court so the Court can grant us the injunction that we seek even though it is prejudicial to the defendants. We didn't make the facts, the defendants made the facts that we are complaining about, and

> they are trying to prolong this thing, drag it out and have us wait another ten years to get relief, and on a conspiracy, these allegations, you have got to plead the overt acts in connection with conspiracy." (Tr. 76, Vol. 13.)

Another matter was raised due to an emergency (see Tr. 86-89, Vol. 13). The emergency concerned the mother of Linda Y. Gishi, one of the plaintiffs herein. Mrs. Gishi's mother, Hanako Oura of the Island of Maui, had cancer and desired to have a neurosurgical operation of the pituitary gland (hypophysectomy) to retard the growth of cancer cells and thus prolong her life. She selected Dr. Silver; he sought admission of Mrs. Oura to Kaiser Hospital, but no beds were available for her (a non-Kaiser Plan member). The only publicly-financed hospital, adequately equipped for the performance of such special surgery, was The Queen's Hospital. The Queen's Hospital would not allow her to use the facilities if she selected Dr. Silver.

It had been an established fact herein that The Queen's Hospital,

". . . has given an 'ASSURANCE' it will comply with Title 6 of the Civil Rights Act of 1964, Public Laws 88-352, to the end that 'no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the applicant receives Federal financial assistance from the Department of Health, Education and Welfare.'" (R. 478-479.)

Plaintiffs filed a Motion for Temporary Restraining Order, and supporting papers on April 26, 1971 (R. 738-749).

Defendants responded to the aforesaid motion on April 29, 1971, with Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order, and supporting papers (R. 750-756).

Judge Boldt denied any relief "re Hanako Oura" (see R. 828, April 29, Entering Order).

The affidavit of Dr. Brown (R. 755) caused Plaintiffs to investigate the relationship of the firm of Messrs Anthony, Waddoups and O'Connor to Kaiser Foundation Hospital, because Dr. Silver had previously tried to get Mrs. Oura admitted

to Kaiser Foundation Hospital and had been told that no beds were available. See R. 832, Affidavit of Maurice L. Silver, M.D.

The investigation disclosed that the said lawyers were the malpractice lawyers for Kaiser Foundation Hospital. They were and had been the lawyers assigned by the hospital malpractice insurance company to secretly represent Maurice L. Silver, M.D., from 1964 through 1968, without notice to Dr. Silver, as his defense attorneys in a "fly-by-night" or "groundless lawsuit" malpractice claim against him (R. 829-882). (The terms "fly-by-night" and "groundless lawsuit" were terms used by J. Garner Anthony, Esq., to describe that alleged malpractice action against Dr. Silver. See pp. 190-191, Tr. Vol. 16, November 9, and 10, 1972.)

Once the defendants opened the use of Kaiser Hospital to Mrs. Oura, she was admitted and Dr. Silver successfully performed the hypophysectomy (R. 832).

After this surgery, and on May 10, 1971,

plaintiffs filed a Motion to Disqualify the Law Firm of Anthony, Waddoups, Hoddick & Brown, Dennis E. W. O'Connor, J. Garner Anthony, and Thomas Waddoups, as Attorneys for All Defendants Except Themselves, Affidavit of Maurice L. Silver, M.D., Memorandum of Points and Authorities in Support of Motion to Disqualify the Law Firm of Anthony, Waddoups, Hoddick and Brown, and Its Partners, Associates and Former Partners and Associates, Exhibits 1 through 14 and Appendix A.

Judge Boldt never responded to that motion to disqualify.

On June 30, 1971, Judge Boldt filed a Memorandum Decision and Order Striking Complaint and Denying Temporary Restraining Order (R. 1666-1673). It is published in Silver v. The Queen's Hospital, et al., 53 F.R.D. 223 (1971).

The complaint was stricken nine (9) months and three (3) weeks after it was filed and in part reported that the plaintiffs' lawyers showed a "serious lack of professional restraint in publicity seeking amounting to an abuse of judicial

process" (referring to a single instance on September 9, 1970) and failure of plaintiffs' counsel to draft a complaint for plaintiffs that complied with the "short and plain" provisions of Rule 8(a). Plaintiffs were denied all relief.

I. First Amended Complaint

On July 30, 1971, plaintiffs filed their first amended complaint (less than 42 pages) in obedience to the aforesaid order. Defendants moved to strike for not complying with Rule 8(a), F.R. C.P. (R. 1729-1779).

On August 27, 1971, plaintiffs filed and served Plaintiffs' Request for Convening of Three-Judge Court and Memorandum of Points and Authorities in Opposition to Motions to Dismiss Complaint and Exhibit A (R. 1780-1809).

Defendant Great American Insurance Co., the corporation that is the sole owner of defendant First Insurance Co. of Hawaii, Ltd., (and the malpractice insurer of Defendant hospitals and "peer review committee" members, the hospital boards and defendant J. Garner Anthony), filed a motion for summary judgment with memo-

randum and exhibits (R. 1810-1874).

This motion by Great American for summary judgment was directed only at any claim by Dr. Silver (R. 1811, 1818). However, this motion disclosed a further interlocking relationship of the defendant Great American that was not heretofore disclosed, that reflected upon the administration of justice in the state courts of Hawaii. The lawyer for Great American was Walter G. Chuck, Esq., who was the personal attorney appearing for the Chief Justice and each of the Justices of the Hawaii Supreme Court and broadcasting his representation by a personal interview over the radio and in the press (see R. 1948-1949).

The case of Silver v. Castle Memorial Hospital, et al., (May, 1972) 53 Haw. 475, 497 P. 2d 564, referred to by Mr. Chuck in Great American's motion for summary judgment, was then pending appeal before his own aforesaid clients. Mr. Chuck's clients wrote the decision in Silver v. Castle Memorial Hospital, et al., supra.

Plaintiffs filed a Memorandum in Opposition to Great American Insurance Company's Motion for Summary Judgment and Exhibits A-C (R. 1945-1966).

Defendant William W. T. Won, M.D., also moved for an alternative motion for more definite statement (R. 1875-1891).

On September 12, 1971, plaintiffs petitioned the court and prayed by way of a Motion for Temporary Restraining Order or Alternative Motion for Order to Show Cause, and supporting papers (R. 1892-1915).

In the affidavits of Plaintiffs Herbert Kealoha (R. 1895-1897), John F. Frey (R. 1898-1899), and Freddie M. Harpole (R. 1900-1902), the plaintiffs tell of the cruel and inhuman treatment they suffer at the hands of defendants.

While Mr. Freddie Harpole was praying for relief according to law in the bosom of the U.S. District Court, he was taken by ambulance to Queen's Hospital and there deprived of the assistance, care or even consultation by his own phy-

sician, Dr. Silver, or any other physician than interns who knew nothing about his case. Mr. Harpole did not survive such attention.

At the instruction of Judge Boldt, a court reporter was present and recorded the proceeding on October 10, 1971, at Queen's Hospital (Vol. 14 of the transcripts filed with this record).

Judge Boldt gave an oral order over the telephone from his home in Tacoma, Washington to Mr. O'Connor and Queen's Hospital to allow Dr. Silver to enter Queen's, examine Mr. Harpole and act as a consultant with the staff doctors at Queen's. The transcript shows how the defendants interpreted Judge Boldt's oral order. Mr. and Mrs. Harpole were never again allowed the services of Dr. Silver at Queen's. Mr. Harpole steadily deteriorated until he died at Queen's and the court never again granted any relief to Mr. or Mrs. Harpole or any of the other plaintiffs.

On October 28, 1971, plaintiffs made a Motion for Protective Order to Protect Class-Action Plaintiffs Under Civil Rights Act and Rules or Temporary Restraining Order, and supporting

papers (R. 2090-2109).

The record shows that no order or directive of any kind was forthcoming that in any manner protected the civil rights or the ordinary rights of the class-action plaintiffs (R. 2094). See R. 2107-2108 for the fact that certain patients are persons with half skulls, holter valves and abnormal EEG's.

In his oral argument of April 23, 1971, Attorney Hayden C. Covington made the following appeal to Judge Boldt prior to the striking of the First Amended Complaint:

> (By Mr. Covington): "I say your Honor [Judge Boldt] with the greatest of deference and respect that this is a dreadful tragedy upon the people of this State and if this doctrine is not nipped in the bud and a stop put to it, it will spread throughout the United States. A man should have the right to make a choice of his own doctor and his own doctor should have the constitutional right to operate on him and save his life. Must he lay there and die, especially in a hospital that is financed by public funds as all these hospitals are?" (Tr. 23-24, Vol. 13; see also R. 2103.)

The record answered the question of Mr. Covington. The death of Mr. Harpole is duly recorded.

Volume 14, the court reporter's transcript of October 10, 1971, of the matter ordered by Judge Boldt discloses that Mr. Harpole's injuries arose out of and in the course of his employment. His hospitalizations were as an injured employee. His employer-insurer was Meadow Gold Dairies Inc. The attorney for Mr. Harpole's employer-insurer was Mr. Donald Beck. Mr. Beck appeared on October 10, 1971, against Mr. Harpole and adversely to Mr. Harpole's employer.

Hawaii Revised Statutes, Sec. 386-21, gave Mr. Harpole the right to select his specialist anywhere in Hawaii.

Hawaii Revised Statutes, Sec. 386-8, required Mr. Harpole's employer-insurer and its lawyer to cooperate with Mr. Harpole in any case of liability of third persons.

Mr. Beck is a partner from the firm of Mr. Beebe (the lawyer-insurance agent who had informed Chief Judge Pence that Dr. Silver was a "crooked assed son of a bitch"). These lawyer-insurance agent-partners were lawyers and

agents for defendant First Insurance Co. of Hawaii, Ltd. (the wholly owned subsidiary of Great American), defendant St. Francis Hospital, its religious governing body, its "peer committee" members, as well as lawyer-agents for the very physicians who were mistreating Mr. Harpole and who refused to consult with Mr. Harpole's designated specialist.

In the course of Mr. Beck's representation against Mr. Harpole, he took action against Mr. Harpole. This was brought to the attention of the court (R. 2106):

> "MR. BECK: Maybe you and Dr. Silver could right now give us a waiver that anything the doctors say to Dr. Silver on a consultation basis will not be used against him . . . " (Tr. 10/10/71, Vol. 14, p. 46.)

Plaintiffs sought aid for themselves and for Mr. Harpole by filing a Reply Memorandum to Memorandum in Opposition to Plaintiffs' Motion for Protective Order or Temporary Restraining Order, and supporting paper on November 8, 1971. In her affidavit, Mrs. Harpole showed that the Queen's Hospital had been chartered by the

then Queen of Hawaii to serve foreigners and natives (Hawaiian) alike as "a public hospital" (R. 2183) and Mrs. Harpole concluded her affidavit with the following:

> "That deponent prays to Honorable George H. Boldt and the United States District Court for help for her husband and herself and asks that Queen's Hospital be ordered to permit Mr. Harpole to use the facilities of Queen's and to have his physician, Dr. Maurice L. Silver, treat Mr. Harpole at said hospital." (R. 2184.)

On December 13, 1971, Hon. James A. Walsh, U.S.D.J. (who was assigned to this case when President Richard M. Nixon appointed Judge Boldt Chairman of the Pay Board) filed an Order Setting Pretrial Hearing and Specifying Agenda (R. 2185-2186). See Vol. 15.

The First Amended Complaint was ordered stricken (R. 2311-2312).

The oral motions of plaintiffs for leave to appeal the ruling to the Ninth Circuit Court of Appeals, were denied as was an oral motion for continuance of pretrial hearing to permit plaintiffs to seek a review of the aforesaid orders

by the Court of Appeals.

II. Second Amended Complaint

A Second Verified Amended Complaint was duly filed February 3, 1972 (R. 2207-2250), as were supporting papers (R. 2313-2338). Plaintiffs respectfully pointed out that:

> "The Department of Health has not made regulations, but it permits these broad laws to be carried into execution by Defendants. This results in permitting Defendants to impose penalties upon the Plaintiffs without trial and without a hearing . . . The Plaintiffs are punished before they ever get to Court and when they complaint in Court, they are punished and ridiculed for complaining." (R. 2317-2318.)

Again, plaintiffs sought the convening of a three-judge court (R. 2318). In Count II, the plaintiffs sought redress of their grievances under 42 U.S.C., Secs. 1981, 1982, 1983, and 1985(1), (2), and (3). In Count III, Dr. Silver sought relief under the Sherman and Clayton Acts against all defendants except Quisenberry, Romson and Morris. The complaint was only 33 pages long.

On February 11, 1972, Argonaut Insurance

Co., the only insurance company insuring doctors for medical malpractice in Hawaii at that time, refused to insure Dr. Silver. The reason given was "Since Argonaut Insurance is involved directly as a party defendant and indirectly as insurer of parties against whom you have brought suit, it would be awkward, if not impractical for us to insure you at this time . . . " See R. 2372-2373 of plaintiffs' Motion for Temporary Restraining Order, and supporting papers, filed with the district court and duly served March 6, 1972 (R. 2368-2381).

Plaintiffs had asked the district court (Judge Walsh) to reconsider the motion of plaintiffs that the certain defendants who are the lead attorneys for defense be disqualified. On March 6, 1972, Judge Walsh entered an order denying the plaintiffs' Motion for Reconsideration (R. 2383).

Plaintiffs sought a writ of mandamus and the Court of Appeals issued the Order set forth in R. 2417-2418. Thereafter, and on July 24, 1972, Judge Walsh entered an Order Assigning Cause

to Honorable Russell E. Smith, Chief Judge, United States District Court for the District of Montana.

A hearing was held and evidence received before Hon. Russell E. Smith in Honolulu, Hawaii, November 9 and 10, 1972, on the motion to disqualify the said lawfirm and lawyers. The motion was denied (R. 3148-3159) and a motion to set aside and reconsider was also denied (R. 2568). A petition for writ of mandamus was denied (R. 2710).

All motions thereafter were determined on briefs and without oral argument (R. 2569).

The Second Amended Complaint was dismissed on February 20, 1973 (R. 2711-2715). Plaintiffs were ordered to not file a third amended complaint as a class, to omit any application for a three-judge court upon the claimed unconstitutionality of certain Hawaii statutes and that all parties who are parties only because of some claimed unconstitutionality of Hawaii statutes be dropped.

The district court ordered:

> "That the allegations of the complaint be strictly limited to facts showing the jurisdiction of the court, the facts showing that Plaintiff Silver was unlawfully denied hospital privileges, and the facts showing damage." (R. 2712.)

The district court further ordered that all allegations with respect to Dr. Silver's "Four-Way Stopcock" be omitted (R. 2713). "That plaintiffs strictly comply with the provisions of Fed. R. Civ. P. 8(a)" (R. 2713). "That the amended complaint be filed within twenty (20) days from the date of the filing of this order." (R. 2713).

In its concluding paragraphs, the district court's order contained the following:

> "It does appear, however, that Plaintiff Silver was denied hospital privileges and it may be that the rights of the other plaintiffs to a free choice of doctors was impaired. It may be that plaintiffs were wronged and it may be that on an antitrust or civil rights theory this court has jurisdiction. So, rather than dismiss the action, I am as a matter of judicial discipline telling the plaintiffs that if they wish to continue this action, they must confine themselves to the area in which I think their claims (if any they have) most likely lie." (R. 2714-2715.)

> "If this order is ignored as the previous orders of the court have been I shall dismiss the action." (R. 2715.)

The plaintiffs here state that they never ignored any orders of the district court and that the record shows they worked diligently to comply with all orders of the court.

III. Third Amended Complaint

The plaintiffs pursuant to the aforesaid order of Judge Smith, filed and served a Third Amended Complaint (R. 2717-2740).

Count I is a claim by Dr. Silver of unlawful denial of hospital privileges in violation of 42 U.S.C., Secs. 1981 and 1983 (R. 2717-2724).

Count II is a claim by Sylvia Frey, Clarence M. Kane, Herbert Kealoha, and Eugene Clark, all citizens who have been seriously injured and who now need the services of their neurological surgeon-specialist. They claim that they are being discriminated against in places of public accommodation in violation of 42 U.S.C., Secs. 2000(a) and 2000(d) and they pray for injunctive relief. They show that the named hospitals are

the only general hospitals in Hawaii serving the public as general hospitals, as part of the State's public health plan. These hospitals receive Hill-Burton funds, as well as other tax monies (R. 2724-2727).

Count III is a claim by Sylvia Frey under 42 U.S.C., Sec. 1985(2) and (3) against defendants for conspiracy to interfere with her constitutional and federally protected rights (R. 2727-2731).

Count IV is a claim by Dr. Silver against all defendants under the Sherman and Clayton Acts (R. 2731-2737).

Defendants filed motions to dismiss the Third Amended Complaint (R. 2806-2992).

Plaintiffs filed a Memorandum of Law in Opposition to Defendants' Motions and In Support of Plaintiffs' Motions, and supporting papers on April 20, 1973 (R. 2992-3137).

On July 23, 1973, the district court filed an Opinion and Order. The district court granted summary judgment as to Count I in favor of some defendants on a theory that the suit by Dr. Silver

against Castle Memorial Hospital, et al. (53 Haw. 475, 497 P.2d 564 [1972]), was res judicata and Dr. Silver could not bring a civil rights claim in the federal court because he did not present a claim under 42 U.S.C., Sec. 1983 to the state court (R. 3164).

The district court, in paragraph 2 (R. 3165), said it denied the motion to dismiss Count I as against the remaining defendants "but it is ordered that the plaintiff within fifteen (15) days following the filing of this order file an amended complaint showing each and all of the specific facts which tend to show that each defendant is acting under color of state law." (R. 3165.) This was Dr. Silver's specific claim.

"As to Count II: The motion to dismiss Count II is granted." (R. 3166). The patients, all taxpayers, whose money supported and continue to support these public hospitals, were denied any right to use them if they wished the services of the only Jew in Hawaii who is a neurological surgeon-specialist, and who has applied to these

publicly financed hospitals for the privilege to treat patients at said hospitals. The district court wrote that it took "judicial notice of Hawaii Revised Statutes Ch. 414 which does forbid racial discrimination and does authorize a state agency to investigate to grant relief. The complaint contains no allegation that there was a compliance with the notice requirements of 42 U.S.C., Sec. 2000a-3(c)" (R. 3167). There is no such law in Hawaii as Hawaii Revised Statutes Ch. 414.

"As to Count III: The motion to dismiss Count III is granted and Plaintiff Sylvia Frey is denied all relief." (R. 3168.) This was the conspiracy claim under 42 U.S.C., Sec. 1985.

"As to Count IV: The motions to dismiss Count IV are granted and plaintiff is denied all relief as to Count IV." This was Dr. Silver's claim under the Sherman and Clayton Acts (R. 3170).

At the same time, Judge Smith entered an order denying plaintiffs' request to depose Mrs. Thelma Reed and he ordered that "Judge Tavares'

order filed December 18, 1970, staying discovery shall remain in effect until further order of this court." (R. 3173.)

Plaintiffs on August 3, 1973, filed a Motion to Set Aside Opinion and Order and Motion for Reconsideration of Plaintiffs' Prayers for Injunctive Relief, and supporting papers (R. 3174-3220).

IV. Fourth Amended Complaint

On August 7, 1973, a Fourth Amended Complaint, as ordered, was filed (R. 3221-3252). Dr. Silver was the only plaintiff allowed to file the fourth amended complaint.

On August 10, 1973, plaintiffs filed a Motion for Rule 54(b) Certification of Finality, and supporting papers (R. 3253-3265). In an accompanying letter to Judge Smith, plaintiffs respectfully asked Judge Smith to grant the Rule 54(b) certification, enclosed a prepared order therefor and requested that the order be granted before August 20, 1973. This last request was to help plaintiffs avoid any issue as to time to appeal.

Only defendants Drs. Lowrey and Brainard

responded to the Motion to Set Aside the Opinion and Order (R. 3266-3276).

It was stipulated that the parties had until September 4, 1973, to answer or otherwise plead to the Fourth Amended Complaint. Judge Smith approved of this stipulation August 20, 1973 (R. 3278).

On August 22, 1973, Dr. Silver, Sylvia Frey, Clarence M. Kane, Herbert Kealoha, and Eugene C. Clark, plaintiffs in the Complaint, First, Second and Third Amended Complaints, filed their Notice of Appeal, bond and Description and Statement of Issues Presented on the Appeal (R. 3282-3296).

On August 30, 1973, without defendants so much as filing one motion against the Fourth Amended Complaint, Judge Smith filed an Order and Judgment (R. 3300-3306). In the Order and Judgment, Judge Smith wrote:

> ". . . In my opinion plaintiffs have had ample opportunity to state a claim as required by the rules; in my opinion they have failed, and in my opinion, solely as a matter of discipline, Count I of the fourth amended complaint should be dismissed without leave to amend. IT IS THEREFORE ORDERED that the defendants and all of them have judgment against the plaintiffs and all of them and that the plaintiffs are denied all relief." (R. 3306.)

On September 4, 1973, after Judge Smith's above Order and Judgment had been filed in Honolulu and served on defendants, defendants initiated the filing of motions to dismiss the already dismissed Fourth Amended Complaint (R. 3307-3322).

On September 6, 1973, plaintiffs filed an Amended Designation of Record. Amended Notice of Appeal, Amended Description, Statement of Issues Plaintiff-Appellants Intend to Present on the Appeal, Exhibits "A" and "B" (R. 3323-3339).

V. History of Appeal to the Ninth Circuit, Court of Appeals

The Ninth Circuit arbitrarily reduced the claims of Appellants to this denominator:

"This action involves Dr. Silver's unsuccessful efforts to secure staff privileges at hospitals in the State of Hawaii for which he first applied, unsuccessfully, in 1961." The court thereafter said, "On appeal actions taken by the respective

judges in dismissal of specific claims and, ultimately, the action itself present seven issues for our consideration." These are itemized as (a) Three-Judge District Court; (b) Class-Action; (c) Antitrust; (d) Civil Rights; (e) Res Judicata; (f) Claim of Sylvia Frey; and (g) Rule 8.

The Ninth Circuit erroneously concluded that "there was neither error nor abuse of discretion in holding the appellants to the requirements of Rule 8, in holding that they have failed to meet those requirements, and in holding that in consequence of this consistent and continuous disregard dismissal was appropriate. See Unpublished Memorandum, Appendix "A".

The Ninth Circuit was clearly wrong in deciding the Three-Judge District Court issue. They misconstrued and misapplied Phillips v. United States, 312 U.S. 246 (1941).

Appellants argued that State laws as construed and applied passed the police power over to the hospital corporation boards. These boards were dominated and controlled by the multina-

tional medical malpractice insurance corporations. Phillips v. U.S., 312 U.S. 246 (1941), cited in the Unpublished Memorandum Decision applies to the "lawless exercise" of properly delegated authority. The Phillips ruling was misunderstood and misapplied in this case.

To illustrate more clearly, Hawaii does not license specialists. Hawaii pases such "licensing" powers to the corporation boards of hospitals. Thus, if a doctor testifies for a human victim of medical malpractice, he will not be "licensed" by these corporate boards to practice according to his special surgical credentials and training in their hospitals. Further, his lack of this special license has been used to discredit him as a witness in the U.S. District Court, District of Hawaii.

In essence, the actual State "licensing" system corrupts and dominates the administration of justice as to the ill and injured in the U.S. District Court, District of Hawaii.

Congress designated a Three-Judge Court for

just such an unconstitutional situation.

CLASS ACTION. The issue is: Are the victims of medical malpractice in the State of Hawaii who seek to receive corrective care and treatment from an independent physician, members of one defined class? The only reasonable answer is "Yes." The action of the defendants groups them into a definable class also.

The fact that one victim of medical malpractice is more severely crippled than another cannot be enough to destroy the class. The class is also comprised of those who are systematically cheated out of a fair trial in State and Federal Courts as a result of the collusion of defendants.

ANTITRUST: The Court wrote:

> "In the first four complaints, Dr. Silver claimed damages and sought injunctive relief under the Sherman and Clayton Acts."

The Court then wrote in parenthesis: "(The services rendered clearly were not in interstate commerce.)"

Goldfarb et ux. v. Virginia State Bar, et al., decided June 16, 1975, has set aside that narrow

construction of the facts and the law.

> "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce."

Attached hereto as Appendix "G", is the recently published (June 20, 1975) report that "PROTESTING DOCTORS INTEND TO REFUSE KONA TOURISTS." The Court took no notice of the fact that Hawaii is a tourist mecca. Tourism is its largest industry. Hawaii's hospitals are part of the total service provided in interstate commerce for tourists.

Interisland commerce is interstate commerce according to all other decisions of the Ninth Circuit. See C.A.B. v. Island Airlines, Inc., 235 F. Supp. 990 (D. Haw. 1964), aff'd. 352 F. 2d 735 (9th Cir. 1965). Hawaii residents and tourists must travel in interstate commerce to get to the major hospitals of Hawaii (defendants herein).

Riggall v. Washington County Med. Soc., 249 F. 2d 266; Elizabeth Hospital Inc. v. Richardson, 269 F. 2d 167, are no longer vital law due to the

Goldfarb decision.

CIVIL RIGHTS. Without accepting any of the complaints and without requiring defendants to answer, the Court has dismissed all the Civil Rights claims of Appellants.

Both the patients and their physician claimed the hospitals were an integral part of the State of Hawaii hospital plan.

There was much more than mere participation in Hill-Burton funds. In Silver v. Castle Memorial Hospital, et al., 53 Haw. 475 (1972), the Hawaii Supreme Court had determined that these hospitals were at least quasi-public.

The court here refused to look at the facts which distinguish this case from Ascherman v. Presbyterian Hospital of Pacific Medical Center, Inc., 507 F.2d 1103 (9th Cir. 1974). The undisputed facts here establish that State of Hawaii regulations through which the federal monies were funnelled, specifically encourage a policy of religious, racial and national origin segregation by doling out millions of dollars to corpora-

tions that were exclusively controlled by racial, national origin and religious groups to the exclusion of minorities. An invidious system of State supported segregation was set forth in the allegations of each complaint as required by law.

Furthermore, The Queen's Hospital was chartered as and was dedicated as a public hospital. See Appendix "I", photographic record from the Archives of State of Hawaii Health Department. The finding that The Queen's Hospital is a private hospital was prejudicial error.

The conspiracy directed at the Appellants was to punish the physician and his patients for the physician's use of his freedom of speech to inform them of his medical and surgical findings. The conspiracy was also directed at obstructing the due administration of justice in the State and Federal courts in Hawaii and elsewhere. The conspiracy also punished the patients by depriving them of the use of the public hospital facilities because they had selected a physician and surgeon who was from a tiny minority in Hawaii.

Dr. Silver is of the Hebrew faith. See Collins v. Hardyman, 341 U.S. 651 (1951) (dissenting opinion), and U.S. v. Guest, 86 S.Ct. 1170, 16 L. Ed. 2d 239 (1966); and Adickes v. Kress & Co., 398 U.S. at 208-210.

The Unpublished Memorandum Decision on its face appears to be a stark departure from the law as pronounced in Corsican v. Productions & Pitchers, 338 F. 2d 441 (1964 C.A. 9th).

> "The accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief, Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99 L.Ed. 2d 80 (1951) . . . precludes dismissal for insufficiency of the complaint except in the extraordinary case where the pleader makes allegations which show on the face of the complaint some insuperable bar to relief."

Enforcement of Civil Rights in the Courts of the United States are extremely difficult. In Ascherman, supra, the Court of Appeals, Ninth Circuit, demonstrated an anger of sorts at the decisions from other Circuits that enforced 42 U.S.C., Secs. 1983 and 1985. In his concurring

opinion in Ascherman, C. J. Duniway severely criticized the decisions from the other Circuits. He concluded:

> "These cases, I think, are wrong, and we are not following them here."

One issue on this Petition to the Supreme Court clearly is whether C. J. Duniway speaks with the authority of the Supreme Court of the United States. A citation of "cert. den." by the United States Supreme Court will be so construed.

RES JUDICATA. The court dismissed the complaint because it did not contain simple and concise statements of the claims. How then did the court review the complaint and determine that certain facts were subject to res judicata, and while all discovery was stayed? Res judicata cannot be assessed against a purely federal claim like the Sherman Act. State courts do not enforce the Sherman Act; that is a function of the Federal Courts. Furthermore the acts complained of were after the decision upon which res judicata was based.

CLAIM OF SYLVIA FREY. The court found

that "The conspiracy was directed at Mrs. Frey, not as a member of a class or race but as a single plaintiff in a single malpractice action. Such is not the stuff of which civil rights actions are made."

Clearly, the court misunderstood and misapprehended the facts and the law. 42 U.S.C., Sec. 1985(2) and (3) are set forth in Appendix "H" attached hereto.

The denial of equal justice is prohibited by the Constitution (42 U.S.C., Sec. 1985). Yick Wo v. Hopkins, (1885) 118 U.S. 356, 370. Sylvia Frey was a victim of a conspiracy to obstruct the due administration of justice. She was one of a class as well as a person. Both she and her physician have been denied right to trial by jury (as have all Appellants) as a result of the Unpublished Memorandum Decision.

RULE 8 ISSUE. Does the Manual for Complex and Multidistrict Litigation alter the requirements of Rule 8?

In Liggett Co. v. Lee, 288 U.S. 517 (1932),

J. Brandeis, dissenting, said that the States were creating Frankenstein monsters by their corporation laws.

Thirty years later, in 1962, these Frankenstein monsters (corporation) were in complete control of the delivery of medical care. They were able to corrupt the administration of justice in the Federal Courts of Hawaii to victims from medical malpractice by interlocking defense lawfirms and medical clinics with hospital boards and multinational insurance corporations.

Spelling this out required a complex and comprehensive pleading. The Manual for Complex cases was designed to permit such pleading.

Judge Boldt was in error when he said the complaint could be read to a jury. It would have been completely replaced by a pretrial order carefully drafted under the guidance of the court.

Apart from the impact of the Manual for Complex cases on Rule 8, it is contrary to established law to use Rule 8 as the basis for closing the courthouse doors on citizens in the name of judi-

cial discretion. See Atwood v. Humble Oil & Refining Co., 243 F.2d 885, 888 (C.A. 5th 1958).

> "'. . . the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'"

REASONS FOR GRANTING THE WRIT

This petition shows the Petitioners are innocent victims of hostile and fierce internal judicial fued and debate concerning (A) procedure; (B) the interpretation and application of Civil Rights law 42 U.S.C., Sections 1981, 1982, 1983, 1985, and 2000a; (C) the continued immunity of the "learned

professions" from the reaches of the Sherman Act; (D) Three-Judge Court Act; (E) Amendment I, the fundamental rights of citizens to petition their courts for redress of grievances; (F) Amendment V, Due Process, and Amendment VII, right to trial by jury, and Amendment XIII, involuntary servitude.

I. The Decisions of the Courts Below Exalted Rule 8(a) Over All Other Federal Rules of Civil Procedure and Rejected Long Established Precedents of This Court and Violated Amendments I, V, VII, VIII, and XIII.

Contrary to Rule 8(f), that all pleadings must be construed so as to do substantial justice and the decisions of this Court that technical objections to pleadings are without merit, Radovich v. National Football League, (1957) 352 U.S. 445, 77 S. Ct. 390, and United States v. Employing Plasterers' Ass'n., (1954) 347 U.S. 186, the lower Federal Courts herein have exalted Rule 8(a)(1) and slammed shut the doors of justice on these innocent victims. See also Atwood v. Humble Oil & Refining Co., 243 F.2d 885 (CA 5th

1958); Spriggs v. Seaton, 271 F.2d 583 (CA 10 1959); Sherman v. Air Reduction Sales Co., (CA 6th 1958) 251 F.2d 543; Securities and Exchange Comm. v. Timetrust Inc., (N.D. Cal. 1939) 28 F. Supp. 34, 1 FR Sert. 8a 25 Case 4; Vol. 2A Moore's Fed. Prac., p. 1703, n. 19.

In spite of directives from this Court that technical objections to pleadings are without merit, the lower federal courts revolted against the authority of the Supreme Court in regard to the application of Rule 8(a)(1). A special manual of procedure was adopted and promulgated to allow the trial judge to take command of all complex cases. In spite of that, in this complex case, the lower courts revolted and struck the complaints for alleged violations of Rule 8(a)(1). Because of this obvious judicial revolt against the authority of Congress and the Supreme Court Petitioners and their attorneys have no guidelines upon which to rely in complex cases especially in the Ninth Circuit.

II. The Decisions of the Courts Below Show a Hostile and Fierce Judicial Feud with Respect to the Interpretation and Application of the Civil Rights Acts.

The language of the Ninth Circuit in this case and in Ascherman v. Presbyterian Hospital of Pacific Medical Center, et al., 507 F.2d 1103 (9th Cir. 1974), argued the day prior to argument in this case, demonstrates a judicial outrage with those precedent setting cases that determine when people are deprived of rights under color of state law. The concluding remark of his Honor Circuit Judge Duniway in Ascherman aforesaid, was "These cases, I think, are wrong, and we are not following them here." Ascherman is then quoted as authority against these petitioners by Judge Duniway.

Thus, one segment of the judicial feud creates its own precedent. The public sees the reflection of this judicial feud in the subsequent newspaper account of how Dr. Ascherman, after 13 years of delayed justice, fostered by this judicial feud, at long last found some justice in the

constitutional interpretation and application of law by some judges in the California State Courts. See Appendix "F" attached.

The victims of the judicial feud herein have exhausted their State remedy in the Hawaii Courts. This is their last resort. They rely on Newman v. Piggie Park Enterprises, Inc., (1968) 390 U.S. 400; United States v. Price, 383 U.S. 787 (1966); Adickes v. Kress & Co., 398 U.S. 144 (1970); United States v. Guest, 383 U.S. 745 (1966); Conley v. Gibson, 355 U.S. 41 (1951); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Presbyterian Church v. Black Liberation Front, 303 F.2d 894 (E.D. Mo. 1969); Mullarkey v. Borglum, 323 F. Supp. 1218 (S.D.N.Y. 1970) Cypress v. Newport News General and Nonsectarian Hospital Ass'n., (1967 CA 4th) 375 F.2d 648, Simpkins v. Moses H. Cone Memorial Hospital, (CA 4th, 1963) 323 F.2d 959; Foster v. Mobile County Hospital Board, (CA 5th, 1968) 398 F.2d 227; Sams v. Ohio Valley General Hospital Ass'n. (CA 4th, 1969) 413 F.2d 825; and see Citta v. Delaware Valley Hospital, (1970) 313 F. Supp.

301; Meredith v. Allen County War Memorial Hospital Commission, (1968) 397 F.2d 33. See also Chiaffitelli v. Dettmer Hospital, Inc., (1971) 437 F.2d 429; Hall v. Garson, 430 F.2d 430, 439; Birnbaum v. Trussel, (CA 2d 1965) 347 F. 2d 86.

The Ninth Circuit and the lower Federal Court rejected the substantive law of the State of Hawaii that the hospitals involved were quasi-public and were part of the state public health system. See Silver v. Castle Memorial Hospital, et al., (1972) 53 Haw. 475, 497 P.2d 564.

This case shows that the Civil Rights feud is not confined to the Archie Bunkers in television script, but permeates the Federal Judicial Branch of Government as well. The hostility of a few in the judiciary should not be allowed to chill the right of those few who dare to enforce the Acts of Congress of the United States by petitioning the Federal Courts for redress.

III. The Decision of the Court Below Flaunts the Authority of This Court to Declare the "Learned Professions" Are Not Immune From the Sherman Act.

The Order of Affirmance and Unpublished Memorandum Decision with respect to what is interstate commerce and restraint of trade are stark departures from the law as set forth in United States v. American Medical Ass'n., 110 F.2d 703, and rejects the authority of the Supreme Court of the United States as to the reaches of the Sherman Act in Goldfarb et ux. v. Virginia State Bar, et al., No. 74-70, decided June 16, 1975. See also Public Utilities Comm. v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927); United States v. Parke, Davis & Co., 362 U.S. 29 (1959); Eastern States Lumber Ass'n. v. United States, 234 U.S. 600; American Tobacco Co. v. United States, 328 U.S. 781 (1946). See also the British case Pratt & Others v. British Medical Ass'n., 1 K.B. 244 (1918).

The hostility of the lower courts is not directed solely against petitioners, their lawyers

and the aforesaid acts of Congress, the revolt is against the constitutional authority of the Supreme Court of the United States to establish judicial precedent.

IV. The Lower Court Has Rejected the Three-Judge Court Act.

A fair and impartial trial by one judge is just as acceptable as a fair and impartial trial by three or three hundred judges. However, if this case was properly within the jurisdiction of the Three-Judge Court Act, and Petitioners verily believe that it was, then the rejection of jurisdiction conformed with the pattern of judicial rejection of the authority of the Constitution and the Supreme Court of the United States.

V. The Decision of the Court Below Defies the Authority of Amendment I.

Freedom of Press, Speech, Religion, and Assembly are totally dependent upon the right and freedom to petition the government for a redress of grievances. All rights are totally dependent upon the right and freedom to petition the federal

courts for redress of grievances. The court below super-imposed an exaggerated interpretation of Rule 8(a)(1) upon the First Amendment rights of the Petitioners therein. The Supreme Court is respectfully requested to use its supervisory authority to re-establish the authority of the First Amendment and restore the authority of Conley v. Gibson, 355 U.S. 41 (1957).

VI. The Court Below Has Denied Petitioners Due Process of Law.

The record in this case is the only one in this decade where all discovery was stayed through three years of attacks by defense and the plaintiffs thrown out of court and their claims declared to be without merit. It is the only record where two disqualified district court judges convened a Two-Judge Federal District Court and their order of stay of discovery was enforced after the said two district court judges were disqualified according to law. No record in the past decade is so shamefully devoid of due process. It is the record of a Star Chamber created by judicial resistance to the Constitution and the authority of

the Supreme Court of the United States. It is a record that shows a judicial enforcement of violations of Amendment XIII, the supreme law against slavery and involuntary servitude. It is a record that shows that illness reduces all humans within this jurisdiction to the involuntary service of the corporations in control of the hospitals. Humans are treated like animals and herded through hospitals like cattle through holding pens for the exclusive profit of those few who claim control of the hospitals and operate them like plantations.

This record shows the procedure of using form to subvert substance as used in the Dred Scott case.

For any or all of the aforesaid reasons, the Supreme Court is respectfully requested to hear these Petitioners. You are their last resort.

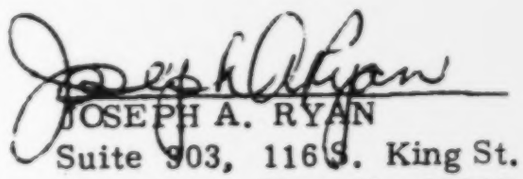
CONCLUSION

Appellants respectfully pray the Court review their pleadings and their efforts to petition for redress of their grievances according to law.

They respectfully ask the Court to recognize they are victims of domestic violence imposed upon them by defendant-respondents through their system of control over the courts as well as the major general hospitals and medical facilities in Hawaii and the specialized fields of medicine and surgery. They pray for a hearing, and after hearing, the lower courts' decisions be set aside and petitioners' complaints be reinstated, and for such other and further relief that is within the jurisdiction of this Supreme Court of the United States.

DATED: Honolulu, Hawaii, January 21, 1976.

Respectfully submitted:



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Designated Lead Attorney
for Petitioners

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAURICE L. SILVER, M.D., et al.,

Plaintiffs-Appellants,

vs.

THE QUEEN'S HOSPITAL, aka QUEEN'S MEDICAL CENTER, a Hawaii non-profit corporation, et al.,

Defendants-Appellees.

Nos. 73-3074
73-3075

MEMORANDUM

On Appeal from the United States District Court for the District of Hawaii

Before: MERRILL, DUNIWAY and INGRAHAM, * Circuit Judges

Plaintiff-appellant Dr. Maurice Silver is a neurosurgeon practicing in Honolulu, Hawaii. Other plaintiffs-appellants are patients of Dr.

* Hon. Joe McDonald Ingraham, Senior U.S. Circuit Judge of the Fifth Circuit sitting by designation.

Silver or spouses of his patients.

Among the defendants-appellees are four hospitals located on the Island of Oahu: Queen's Medical Center, St. Francis Hospital, Kuakini Hospital and Castle Memorial Hospital. Individual defendants-appellees include the administrators of those hospitals; members of their boards of directors or trustees; attorneys who have represented two of them; physicians practicing on Oahu; the Director of Health of the State of Hawaii; and the administrator and chairman of the Credentials Committee of Maui Memorial Hospital, a public institution. Also named are six insurance companies that have written policies for hospitals or physicians.

This action involves Dr. Silver's unsuccessful efforts to secure staff privileges at hospitals in the State of Hawaii for which he first applied, unsuccessfully, in 1961. In 1966 Castle granted him privileges in neurosurgery on probation under observation. In 1967 Castle refused to renew this privilege and was sued in state court by Dr. Silver, along with its administrators and trustees and Doctors Lowrey, Cloward, Reppun, Poulson and Rose. The complaint alleged common-law and antitrust conspiracies to deprive Dr. Silver of staff privileges. After five and one half months of trial the state court granted the defendants a directed verdict which, as to the prayer for money damages, was upheld on appeal by the Hawaii Supreme Court, that court finding the contentions of conspiracy and antitrust violations to be without merit. The supreme court did, however, reverse on the issue of equitable relief against Castle, and on remand the lower court ordered that Dr. Silver's privileges at Castle be restored.

In 1973 Kuakini Hospital granted Dr. Silver staff privileges.

A total of five complaints have been filed in this action and six district court judges (Judges Pence, Tavares, Bruce Thompson, Boldt, Walsh and Smith) have been involved in the proceedings to date. The successive complaints have been, in general, in response to continued objections by the defendants, upheld by successive district judges, that there was a failure to comply with the requirements of Rule 8, Federal Rules of Civil Procedure, that the complaint contain a short and plain statement of the claim and that the averments be simple, concise and direct. In the course of these attacks on the complaints certain issues tendered by the plaintiffs have by court order been disposed of as without merit and ultimately all plaintiffs, except Dr. Silver, were eliminated. The fifth complaint was filed by Dr. Silver as the sole plaintiff. It, too, was dismissed, this time without leave to amend. On appeal actions taken by the respective judges in dismissal of specific claims and, ultimately, the action itself present seven issues for our consideration.

1. Three-Judge District Court

In the first three complaints appellants sought the convening of a three-judge district court under 28 U.S.C. §§ 2281 and 2284. In dismissing the third complaint the court finally disposed of this claim without leave to amend.

Three groups of statutory provisions were challenged by appellants. As to none of them can appellants be regarded as aggrieved. As to none

of them would an injunction advance the interests of appellants. None can be said to be unconstitutional on its face.

(1) Hawaii Revised Statutes, chapter 453 (Supp. 1973), deals with the issuance and suspension of licenses for the practice of medicine and surgery. The provisions under attack are typical of state provisions in this area of regulation. They require a license, set forth a form of license, provide for limited and temporary licenses and set the qualifications for examination. This chapter can have no adverse effects upon Dr. Silver. He is already admitted to practice in Hawaii and his license is not being threatened.

(2) Chapter 323, part II (1968), deals with hospitals and medical facilities. Its purpose is to qualify Hawaii institutions for federal funding. Authority is vested in the state department of health to make inspections and prescribe rules and regulations and take such action is necessary to comply with the requirements for federal funding.

(3) Sections 663-1.7 (Supp. 1973), and 624-25.5 (Supp. 1973) (formerly § 625-15), relate to peer review committees for dealing with professional problems. The sections afford a qualified immunity for any member of such committee, absent malice, and exempt committee proceedings from normal discovery. They have no application to Dr. Silver's requests for staff privileges. They do not confer immunity on hospitals. The exemption from discovery is subject to an exception in the case of one requesting hospital staff privileges.

At most the challenge to the legislation presents issues not as to whether it is invalid, but as to whether authority it confers is being unconstitutionally exercised. As stated in Phillips v. United States, 312 U.S. 246, 252 (1941):

> "* * *an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a state conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of § 266 [the predecessor of present § 2281]."

We find no error in refusal to convene a three-judge court nor lack of jurisdiction in the single judge to proceed with the case.

2. Class Action

Plaintiffs other than Dr. Silver purported to bring suit as representatives of a class consisting of all present and potential future patients of Dr. Silver. The court refused to permit the action to continue as a class action, holding:

> "I am on the present record unable to find the existence of the facts required by Fed. R. Civ. P. 23 (a)(1), (3), and (4) and Fed. R. Civ. P. 23(b)(1)(A), and I find that a class action is not superior to other available methods for the fair and efficient adjudication of the controversy. It may be that given an opportunity to supplement the present record plaintiffs could demonstrate some possible reason for the maintenance of a class action, but in view of what has happened here I could not be convinced that plaintiffs are proper parties to maintain it."

We cannot say that this constituted an abuse of discretion. The injuries suffered by patients of doctors for denial of access to hospitals can be so widely diverse in their extent and circumstances that joinder, rather than class action, can quite reasonably be felt to be preferable.

Further, we cannot help but remark that the experience of the successive judges in their efforts to secure compliance with Rule 8, Federal Rules of Civil Procedure (which we discuss later), itself provides support for the judges' expressed doubt that these plaintiffs are proper class representatives.

3. Antitrust

In the first four complaints Dr. Silver claimed damages and sought injunctive relief under the Sherman and Clayton Acts. These claims were all dismissed for failure to allege the substantial and direct effect on interstate commerce which is necessary for federal jurisdiction. (The services rendered clearly were not in interstate commerce.)

This was not error. In Riggall v. Washington County Medical Society, 249 F.2d 266, 268 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1958), the court stated:

> "The mere fact that plaintiff at his location in Arkansas may be treating other patients from other states who must travel interstate does not result in practicing his profession in interstate commerce as the transportation of such patients is incidental."

To the same effect are Elizabeth Hospital,

Inc. v. Richardson, 269 F.2d 167 (8th Cir.), cert. denied, 361 U.S. 884 (1959), and Robinson v. Lull, 145 F. Supp. 134 (N.D. Ill. 1956).

In John Kalin Funeral Home, Inc. v. Fultz, 313 F. Supp. 435 (W.D. Wash. 1970), aff'd 442 F.2d 1342 (9th Cir), cert. denied, 404 U.S. 881 (1971), the district court, affirmed by this court, relied on both Riggall and Elizabeth Hospital in holding that no direct and substantial effect on interstate commerce had been shown. We find no distinction between the factors there asserted to create such an effect, and in that respect rejected by the court, and those asserted here. No direct or substantial effect on interstate commerce has, then, been alleged here.

Nor do the factors undergo change when applied to interisland commerce. We thus need not reach the question whether interisland commerce is, in Hawaii, necessarily interstate.

4. Civil Rights

Appearing at various points throughout the five complaints are claims that plaintiffs have suffered violation of civil rights in various respects. These claims ultimately were dismissed.

Dr. Silver alleged that he had been deprived of the right to practice his profession, of the right professionally to have access to the defendant hospitals, and of the right to equal protection of the laws in that he had been denied staff privileges because of his religion. Plaintiff patients alleged that by virtue of the denial of staff privileges to Dr. Silver they had been denied the right to use of defendant hospitals and to the doctor of their choice. With the exception of Dr. Silver's

claim founded on religion, these claims are not based on rights guaranteed by the Constitution or laws of the United States. As to the issue concerning religious discrimination, although offered ample opportunity by leave of court to amend, Dr. Silver has wholly failed to allege facts in support of his conclusory allegations.

Further, despite continual urging by the district court, there has been no showing that deprivation of rights in the various respects claimed were under color of state law. The hospitals are not public, but private, institutions. The receipt of federal funds under the Hill-Burton Act is not in itself sufficient to constitute the recipient a state agency nor to render its conduct action under color of state law. Ascherman v. Presbyterian Hospital of Pacific Medical Center, Inc., 507 F.2d 1103 (9th Cir. 1974); id. at 1105 (Duniway, J., concurring); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974); Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

We conclude that dismissal of the civil rights claims was not error.

5. Res Judicata

The district court ruled that count I of the fourth complaint was identical to that unsuccessfully litigated by Dr. Silver in state courts and thus was barred by res judicata. Appellants contend that the present case covers a different period of time, including time after that covered by the state action. However, no new acts were alleged here on the part of Castle, its staff or board (parties to the state action). Instead this case involved the very acts that gave rise to the claims advanced in the state action.

Appellants contend that this action is different, since discrimination here alleged is founded on religion. The acts that were the subject of the state and federal claims were, however, the same. If plaintiffs in the state action did not complain that those acts were founded on religious discrimination, still that complaint was available to them. The district court correctly held that res judicata under these circumstances applied not only to the issues actually litigated in state court, but to those that could have been litigated. Francisco Enterprises v. Kirby, 482 F.2d 481, 485 & nn. 5, 6 (th Cir. 1973), cert. denied, 415 U.S. 916 (1974); Flynn v. State Board of Chiropractre Examiners, 418 F.2d 668 (9th Cir. 1969).

Appellants contend that public policy should in this case preclude application of the doctrine of res judicata. We find no merit in this contention.

We conclude that holding the claims barred by res judicata was not error.

6. Claim of Sylvia Frey

In count III of the fourth complaint plaintiff Sylvia Frey alleged that defendants have conspired to deprive her of her right to equal protection in violation of 42 U.S.C. § 1985(2) and (3). The court dismissed this count for failure to state a claim upon which relief can be granted.

The basis for Mrs. Frey's claim was an alleged conspiracy the purpose of which was to discredit Dr. Silver as a witness for Mrs. Frey in a malpractice suit brough by her in state court. Dr. Silver was one of four doctors testifying on Mrs. Frey's behalf. In that suit judg-

ment was rendered against Mrs. Frey and was upheld on appeal to the Hawaii Supreme Court. The conspiracy allegedly was accomplished by procuring Dr. Silver's removal from the staff of Castle Memorial Hospital and then alluding to that fact in the trial of the malpractice suit. The district court dismissed the claim on the grounds that the alleged conspiracy was not the kind of tort for which civil rights remedies are afforded. The court stated:

> "The conspiracy was directed at Mrs. Frey, not as a member of a class or race but as a single plaintiff in a single malpractice action. Such is not the stuff of which civil rights actions are made."

We agree. In Griffin v. Breckenridge, 403 U.S. 88, 102 (1971), the Court states:

> "The constitutional shoals that would lie in the path of interpreting § 1985 (3) as a general federal tort law can be avoided by giving full effect to the congressional purpose--by requiring as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. * * * The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." (footnotes omitted)."

7. Rule 8

Judges Boldt, Walsh and Smith successively sought to gain from appellants a complaint which might be regarded as answerable. The documents tendered were rambling, verbose, argumentative and crammed with irrelevant conclusory and evidentiary material. Judge Boldt commented, with reference to the first complaint:

> "The Complaint contains many pages of totally unnecessary allegations couched in argumentative, inflammatory and conclusory terms. Some of the superfluous allegations cast gratutious aspersions upon persons not named as defendants, including various public officials and judicial officers because of the rulings made in other cases."

In light of these judicial remarks, plaintiffs' failure throughout four successive amendments to meet the requirements of Rule 8 suggests willfulness. Even on appeal appellants' position seems to be not that Rule 8's requirements were met, but rather that the rule should not be held to apply to such a complex action as this. Complexity, however, is no justification for such pleading as is presented here.

Eventually and understandably patience was exhausted. In dealing with the fourth complaint the court stated that any amendment should contain specification of acts done under color of state law. When the fifth complaint was filed the judge stated:

> "There has been a general noncompliance with the order to conform to Rule 8(a). Count

II of the fourth amended complaint [i. e. the fifth complaint] does not, in light of the orders of the court, sufficiently allege that the acts done were done under color of state law. For these reasons, and on my own motion, IT IS ORDERED that Count II of the fourth amended complaint is dismissed without leave to amend."

Count I of that complaint presented a new legal theory. The judge stated:

"At some point a plaintiff owes some obligation to the court and to the defendants. At some time the reckless sweep should give way to the controlled thrust. In my opinion plaintiffs have had ample opportunity to state a claim as required by the rules; in my opinion they have failed, and in my opinion, solely as a matter of discipline, Count I of the fourth amended complaint should be dismissed without leave to amend."

We find neither error nor abuse of discretion in holding appellants to the requirements of Rule 8, in holding that they have failed to meet those requirements, and in holding that in consequence of this consistent and continuous disregard dismissal was appropriate.

Judgment affirmed.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAURICE L. SILVER, M.D., et al., *Plaintiffs-Appellants,* vs. THE QUEEN'S HOSPITAL, etc., et al., *Defendants-Appellees.*	Nos. 73-3074 73-3075 ORDER OF AFFIRMANCE

[June 18, 1975]

Before: MERRILL, DUNIWAY and INGRAHAM,* Circuit Judges

For reasons that in our judgment do not warrant their publication as opinion under standards recognized by this court,[1] but are set forth in the accompanying memorandum.

Judgment is affirmed.

FOR PUBLICATION

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*Honorable Joe McDonald Ingraham, Senior U.S. Circuit Judge of the Fifth Circuit, sitting by designation.

[1]See: Rule 21, Rules of the United States Court of Appeals for the Ninth Circuit.

Judge Boldt (one of six judges who participated in proceedings in the district court) published a Memorandum Decision and Order in connection with dismissal of the complaint with leave to amend. *Silver v. Queen's Hospital,* 53 F.R.D. 223 (D.Haw. 1971). Appeal here does not turn on any action there taken and Judge Boldt's rulings accordingly are not here under review.

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APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAURICE L. SILVER, M.D., et al.,	)	
Plaintiffs-Appellants,	)	No. 73-3074 No. 73-3075
vs.	)	
	)	ORDER
THE QUEEN'S HOSPITAL, etc., et al.,	)	
Defendants-Appellees.	)	

On Petition for Rehearing

Before: MERRILL, DUNIWAY and INGRAHAM, *
Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. The panel, with Judge Ingraham refraining from voting, has voted to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of

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* Honorable Joe McDonald Ingraham, Senior U.S. Circuit Judge of the Fifth Circuit, sitting by designation.

the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAURICE L. SILVER, M.D., et al.,

Plaintiffs,

v.

THE QUEEN'S HOSPITAL, aka QUEEN'S MEDICAL CENTER, a Hawaii non-profit corporation, et al.,

Defendants.

Civil No. 70-3239

ORDER

Defendants' motions to dismiss the second amended complaint are granted. Plaintiffs are granted leave to file a third amended complaint upon the following conditions:

1. There be omitted from the complaint any reference to any class action. 1/

1/ I am on the present record unable to find the existence of the facts required by Fed. R. Civ. P. 23(b)(1)(a), and I find that a class action is not superior to other available methods for the fair and efficient adjudication of the controversy. It may be that given an opportunity to supplement the present record plaintiffs could demonstrate some possible reason for the maintenance of a class action, but in view of what has happened

2. There be omitted from the complaint any application for a three-judge court based upon the claimed unconstitutionality of certain Hawaiian statutes and that likewise all parties who are parties only because of some claimed unconstitutionality of the Hawaiian statutes be dropped from the action. 2/

3. That the allegations of the complaint be strictly limited to facts showing the jurisdiction of the court, the facts showing that Plaintiff Silver was unlawfully denied hospital privileges,

here I could not be convinced that plaintiffs are the proper parties to maintain it.

2/ I do not believe that the complaint could be successfully amended in this regard. The statutes in question are Hawaiian Revised Statutes § 323-15(1), (2), and (7), § 323-20, § 453-2, -4, and -7, § 63-1.7, and § 625-15, which do not appear on their face to be unconstitutional. If regulations enacted under them were of state-wide application (Moody v. Flowers, 387 U.S. 97 (1967); Jones v. Board of Regents, 436 F.2d 618, 619 (9th Cir. 1970) then a three-judge court might be properly convened. No general regulations enacted under these statutes are set out in or referred to by the complaint. Rather the complaint contains sweeping conclusions which can be interpreted to allege that some actions done under the color of statutes by individuals deprive plaintiffs of some constitutional rights. 28 U.S.C. §§ 2281-2284 were not designed to reach such a case.

and the facts showing damage. 3/

4. That any allegations with respect to Dr. Maurice Silver's "four-way stopcock" be omitted. 4/

5. That plaintiffs strictly comply with the provisions of Fed. R. Civ. P. 8(a).

6. That the amended complaint be filed within twenty (20) days from the date of the filing of this order.

By way of explanation:

This action was filed in September 1970. On June 30, 1971, the Honorable George A. Boldt struck the complaint because it did not conform

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3/ The present complaint contains general allegations to the effect that defendants are conspiring to use the laws of Hawaii as immigration laws which in effect deprive doctors of the right to freely practice and patients the right to freely choose. If this is so, still Plaintiff Silver is in Hawaii, has practiced there, and has only a citizen's concern as to the conspiracy to restrain migration to Hawaii. A resolution of these problems is better left to some doctor upon whom the burden of these conspiracies would fall.

4/ This controversy seems to be separate from the controversy revolving around the hospital privileges. I seriously doubt that most of the defendants named have any conceivable relationship to a "stop-cock" conspiracy. If there is such a conspiracy it may be the subject of a separate suit.

to the requirements of Fed. R. Civ. P. 8(a). The opinion is sued in connection with the order in clear language stated the requirements of the rule, the reasons for it, and the duty of lawyers and litigants with respect to it. A first amended complaint, shorter than the original but essentially no better, was filed. The Honorable James A. Walsh struck that complaint for the reason that it likewise did not conform to the requirements of Fed. R. Civ. P. 8(a). Now a third complaint is filed, somewhat shorter than the second but essentially no better. It would be almost impossible to answer it. Between September 1970 and February 1973 a file about 12 inches thick has been built up and even so this case is not substantially closer to trial today than it was when it was filed. All of this is costly to plaintiffs and to defendants (many of whom one suspects should not be named). I think that the parties to an action and the courts are entitled to have the action proceed according to the rules. As Judge Boldt said in his opinion "neither the Court nor opposing counsel should be required to expend time and effort searching through large masses of conclusory, argumentative, evidentiary and other extraneous allegations in order to discover whether the essentials of claims asserted can be found in such a melange."

I think that at some point a court is justified in dismissing a case with prejudice if a plaintiff who seeks relief through the court is unwilling to conform to the established rules, and it is my opinion that this court would now be justified in dismissing this action for disciplinary reasons.

It does appear, however, that Plaintiff Silver was denied hospital privileges and it may be that

the rights of the other plaintiffs to a free choice of doctors was impaired. It may be that plaintiffs were wronged and it may be that on an antitrust or civil rights theory this court has jurisdiction. So, rather than dismiss the action, I am as a matter of judicial discipline telling the plaintiffs that if they wish to continue this action they must confine themselves to the area in which I think their claims (if any they have) most likely lie.

If this order is ignored as the previous orders of the court have been I shall dismiss the action.

DATED this 15th day of February, 1973.

/s/ Russell E. Smith
Russell E. Smith
United States District Judge

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MAURICE L. SILVER, M.D., et al., Plaintiffs, v. THE QUEEN'S HOSPITAL, aka QUEEN'S MEDICAL CENTER, a Hawaii non-profit corporation, et al., Defendants.	Civil No. 70-3239 OPINION AND ORDER

As to Count I

1. The motion to dismiss Count I filed by the defendants Castle Memorial Hospital, John J. Lowrey, Ralph B. Cloward, J. I. Frederick Reppun, Don E. Poulson, Robert A. Rose, Perry Sumida, Charles Yamashiro, Marvin C. Midkiff, and A. G. Streifling is considered with the affidavit of John A. Hoskins and is treated as a motion for summary judgment. The motion for summary judgment is granted, and as to said defendants the plaintiff is denied all relief on Count I.

It appears that these defendants were defendants in a damage suit filed by plaintiff herein in

the state courts of Hawaii. One of the purposes of that suit, as of this one, was to recover damages because plaintiff was denied hospital privileges in the Castle Memorial Hospital. Following a trial, judgment was entered denying money damages, and that portion of the judgment was affirmed on appeal.[1/] Count I of the complaint in this case in essence presents the same grievance, i.e. that plaintiff was deprived staff privileges in the Castle Memorial Hospital. To sustain federal jurisdiction the instant case alleges that plaintiff was under color of state law deprived of equal protection because he was Jew. There is some indication that the racial issue was injected into the trial in the state court but, whether it was or not, the basic subject matter of the state suit and this suit is the same and plaintiff might have presented as an additional theory of recovery his claims under 42 U.S.C. § 1983. State courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, except where jurisdiction has been restricted by Congress to the federal courts. There is no congressional restriction of suits under 42 U.S.C. § 1983. Grubb v. Public Utilities Commission, 281 U.S. 470 (1930) is authority for that proposition and also for the proposition that "a judgment upon the merits in one suit is res judicata in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end.

1/ Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P.2d 564 (1972).

Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 319; United States v. Moser, 266 U.S. 236, 241; Cromwell v. County of Sac, 94 U.S. 351, 352."

2. The motion to dismiss as to Count I is denied as to all defendants not named in paragraph 1 above, but it is ordered that the plaintiff within fifteen (15) days following the filing of this order file an amended complaint showing each and all of the specific facts which tend to show that each defendant is acting under color of state law.

I am of the opinion that the receipt by a hospital of Hill-Burton funds is not alone sufficient to make the acts of the hospital acts done under color of state law. I will follow Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F. Supp. 1020 (S.D.N.Y. 1971). If there are facts which would tend to throw this case into the ambit of Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964), they should be set forth. I have with some reluctance denied the motion to dismiss because of the blanket allegation that defendants acted under color of state law. If the hospitals involved are acting under color of state law that would not involve the individual defendants except to the extent that each of them did some act under the authority granted them by the hospital. It is not enough that a doctor was a member of a hospital staff or of a peer committee unless that doctor did some affirmative act under color of state law which discriminated against plaintiff.

As to Count II:

The motion to dismiss Count II is granted.

In Count II plaintiffs seek injunctive relief. Jurisdiction is claimed on the basis of 42 U.S.C. § 2000a-6(a) and (b) and 28 U.S.C. §§ 1331 and 1343(3).

Perhaps, if a hospital is a place of public accommodation, which I do not decide, (42 U.S.C. § 2000a (b)) the broad and sweeping allegations of the complaint would be sufficient if there had been a compliance with the provisions of 42 U.S.C. § 2000a-3(c).

I take judicial notice of the law (Hawaii Revised Statutes Ch. 414) which does forbid racial discrimination and does authorize a state agency to investigate to grant relief. The complaint contains no allegation that there was a compliance with the notice requirements of 42 U. S. C. § 2000a-3(c).

If it is a fact that the notices required by 42 U.S.C. § 2000a-3(c) have been given, Plaintiffs may within fifteen (15) days following the filing of this order file an amended complaint stating such fact. In this connection the attention of counsel is directed to Fed. R. Civ. P. 11. If the notices were not given plaintiff shall not file an amended complaint and upon advise of counsel for defendants that an amended complaint has not been filed within the time allowed I will dismiss Count II.

If an amended complaint is filed it shall

clearly disclose the theory upon which plaintiffs will proceed. Are plaintiffs deprived of services because of their race? Or is the claim that they are deprived of services because Dr. Silver may not practice in the hospitals, and since they will not employ any other doctor, they are deprived of hospital services? Plaintiffs will concisely allege sufficient facts so that it may be ascertained exactly what each defendant did.

As to Count III:

The motion to dismiss Count III is granted and Plaintiff Sylvia Frey is denied all relief.

Plaintiff asserts jurisdiction under 42 U.S.C. § 1985(2) and (3), and 28 U.S.C. §§ 1331 and 1343(1), (2), (3), and (4).

Plaintiff unsuccessfully prosecuted a malpractice case against some of the defendants in this case. She now alleges there was a conspiracy, the purpose of which was to discredit Dr. Silver who was a witness for her in the malpractice suit. This conspiracy was accomplished by procuring Dr. Silver's removal from the staff of Castle Memorial Hospital and then alluding to that fact in the trial of her malpractice case. Such a conspiracy directed at plaintiff would be a tort but not the kind of a tort for which civil rights remedies are afforded. In Griffin v. Breckenridge, 403 U.S. 88 (1971) the court said at page 102:

> . . . The constitutional shoals that would lie in the path of interpreting § 1985 (3) as a gen-

eral federal tort law can be avoided by giving full effect to the congressional purpose--by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

(Footnotes omitted.)

While the complaint contains sweeping allegations of conspiracies to violate plaintiff's rights to equal protection, the fact is that even if the allegations of the complaint were proved they would show as to Plaintiff Frey nothing more than a conspiracy to diminish Dr. Silver as a witness on plaintiff's malpractice suit. The conspiracy was directed at Mrs. Frey, not as a member of a class or a race, but as a single plaintiff in a single malpractice action. Such is not the stuff of which civil rights actions are made.

There is no federal question jurisdiction. 28 U.S.C. § 1331. Unless it could be said that the right sued upon originated in the civil rights statutes above mentioned plaintiff's rights do not stem from federal law and the case does not present a federal question. See California v. General Motors Corp., 431 F.2d 732 (9th Cir. 1970).

As to Count IV:

The motions to dismiss Count IV are granted and plaintiff is denied all relief as to Count IV.

It is essential to an action under the Sherman Act (15 U.S.C. § 1) that the conspiracy complained of be in restraint of trade or commerce among the several states. It is alleged that the hospitals involved are within interstate commerce in that they are used by tourists traveling in interstate commerce and that drugs and medicines used move in interstate commerce. There is no substantial difference between the allegations here and those in Elizabeth Hospital, Inc., v. Richardson, 269 F.2d 167 (8th Cir. 1959), cert. denied, 361 U.S. 884 (1959), and for the reasons stated by the Court of Appeals for the Eighth Circuit, I am of the opinion that the complaint fails to allege a cause of action under the federal antitrust laws. See also Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1957).

Plaintiff seeks to distinguish Elizabeth Hospital and Riggall on the ground that in those cases there were no claims of per se violations of the Sherman Act, such as price fixing. It is alleged here that one of the purposes of the conspiracy was to fix prices. True, the language of the opinions in those cases does indicate that there were no claims of price fixing, but I am of the opinion that such language was not necessary to the decisions. It is true that a local conspiracy to fix the price of goods moving in interstate commerce is a per se violation of the Sherman Act (Las Vegas Merchant Plumbers Association v. United

States, 210 F.2d 732 (9th Cir. 1954), cert. denied, 348 U.S. 817 (1954)), but it is also true that a conspiracy to fix prices of goods which are not moving in interstate commerce does not of itself operate to extend jurisdiction under Sections 1 and 2 of the Sherman Act. In Page v. Work, 290 F.2d 323 (9th Cir. 1961), cert. denied, 368 U.S. 875 (1961), the court said at page 331:

> . . . Appellant argues that when charges of price fixing and territorial division of a market exist at a local level on a produce which never enters the flow of interstate commerce, nevertheless a per se violation of Section 1 has been made out, and that federal jurisdiction attaches, and that the amount of interstate commerce affected by such restraints is immaterial. The so-called qualitative test of the illegal per se doctrine does not itself operate to extend federal jurisdiction under Sections 1 and 2 to purely local restraints applied at a local level to a product which never enters into the flow of interstate commerce . . . .

Here, of course, all the services involved are by necessity rendered in the hospitals and can in no way enter the flow of interstate commerce.

Additionally plaintiff claims that persons seeking medical services travel over international waters between islands. The fact, if it is a fact, that patrons of defendants travel over international waters does not alter the result. The State of Hawaii consists of the several islands, their appurtenant reefs and territorial waters. Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4. Travel from one island to another does

not constitute the "trade or commerce among the several states or with foreign nations" which is essential to Sherman Act jurisdiction.

DATED this 20th day of July, 1973.

/s/ Russell E. Smith
Russell E. Smith
United States District Judge

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAURICE L. SILVER, M.D., et al.,	)	
Plaintiffs,	)	Civil No. 70-3239
v.	)	ORDER AND JUDGMENT
THE QUEEN'S HOSPITAL, aka QUEEN'S MEDICAL CENTER, a Hawaii non-profit corporation, et al.,	)	
Defendants.	)	

This case has from the beginning been a judicial nightmare. It involves the relationship of the plaintiff with the hospitals and doctors of Hawaii and is primarily based, in all of the multiple legal theories that have been advanced, on the fact that the plaintiff Silver has been deprived of the right to practice his profession as a neurosurgeon in the major hospitals in Hawaii.

Judge Boldt, Judge Walsh, and I have stricken or dismissed complaints for failure to comply with Fed. R. Civ. P. 8(a). In each case the reasons for the action taken have been stated and plaintiffs have been admonished to follow the rules.

On July 23, 1973, I entered an opinion and order. On August 3, 1973, plaintiff filed a motion to set aside that order. On August 7, 1973, a fourth amended complaint was filed. On August 10, 1973, a motion to certify the finality of the orders of July 23, 1973, was filed. Although there was no certification under 28 U.S.C. § 1292 (b), on August 22, 1973, a notice of appeal directed to the court's order of July 23, 1973, was filed, and on August 27, 1973, further papers relating to the appeal were filed. 1/

Plaintiffs complain that by granting leave to amend the court has postponed their rights to appeal and has in effect deprived them of due process. With this in mind and also having in mind the procedural jungle into which the rather peculiar series of filings may lead us, I make the following orders:

AS TO COUNT I OF THE THIRD AMENDED COMPLAINT AND COUNT II OF THE FOURTH AMENDED COMPLAINT:

1. For the reasons stated in the order of July 23, 1973, the summary judgment therein granted is in all respects confirmed as to the defendants Castle Memorial Hospital, John J. Lowrey, Ralph B. Cloward, J. I. Frederick Reppun, Don E. Poulson, Robert A. Rose, Perry Sumida, Charles Yamashiro, Marvin C. Midkiff, and A. G. Streifling.

2. In the order of July 23, 1973, the court directed plaintiff to file an amended complaint showing the specific facts tending to show that each defendant (other than those as to whom summary judgment had been granted) was acting under color of state law. Not only does the fourth amended complaint fail to conform to Fed. R.

Civ. P. 8(a), but it does not allege the specific acts which show that defendants are acting under color of state law. These hospitals are private hospitals. They are no less private because they furnish an indispensable service. A private activity does not become a state activity because in some areas the state exercises a measure of control. Thus a private slaughterhouse does not become a governmental agency because it must comply with legally imposed sanitation standards, nor does a hotel become a state agency because the state requires a compliance with fire regulations. No doubt the state has power to forbid racial discrimination in the selection of hospital staffs. The failure of a state to forbid such discrimination does not make a discriminatory act by a hospital a state act.

I am of the opinion that the receipt of Hill-Burton funds is not of itself sufficient to make a hospital a state instrumentality or to make the acts of the hospital in the regulation of its internal affairs acts done under color of state law.

The plaintiffs were ordered to allege additional specific facts showing that each defendant acted under color of state law. Plaintiffs alleged:

> . . . The State of Hawaii has delegated to the boards of said hospitals, their staff-physicians and agents as well as to the medical malpractice insurers of said hospitals and staff physicians the exclusive and arbitrary right tc license and regulate the practice of all physicians and surgeons who are specialists including all American Board certified neurological surgeons and to grant, revoke, limit or deny the aforesaid specialists the

right and license to practice professionally in said hospitals and for reasons based on race, creed, color and national origin and other unconstitutional reasons.

--Fourth Amended Complaint, p. 20

I do not regard the quoted language to be a statement of specific facts. I do not believe that Hawaii Revised Statutes § 663-1.7 limiting the liability of peer review committees or § 625-15 relating to the discovery of proceedings and records of peer review committees are sufficient to make the acts of the peer committees acts done under color of state law. There has been a general noncompliance with the order to conform to Rule 8(a). Count II of the fourth amended complaint does not, in light of the orders of the court, sufficiently allege that the acts done were done under color of state law. For these reasons, and on my own motion, IT IS ORDERED that Count II of the fourth amended complaint is dismissed without leave to amend.

AS TO COUNT II OF THE THIRD AMENDED COMPLAINT:

The court in its order of July 23, 1973, erroneously applied Ch. 515 of Hawaii Revised Statutes (misdescribed in the order as Ch. 414). IT IS THEREFORE ORDERED that the order of July 23, 1973, be amended by striking therefrom all of the language relating to Count II, and the following order is made with respect to Count II of the third amended complaint:

IT IS ORDERED that Count II of the third amended complaint is dismissed without leave to amend.

I do not interpret Count II of the complaint to allege that the plaintiffs were denied public accommodations because of their race or color, but rather to allege that because Dr. Silver is denied the right to practice in the defendant hospitals and because plaintiffs will have no doctor other than Dr. Silver they are effectively denied public accommodations.

The right protected by 42 U.S.C. § 2000a is the right to be free of racial discrimination in public accommodations. Dr. Silver is not denied public accommodations and plaintiffs are not denied public accommodations. What is sought to be protected is the right to choose a doctor and that right is not protected under 42 U.S.C. § 2000a, et seq.

AS TO COUNT III OF THE THIRD AMENDED COMPLAINT:

The order of July 23, 1973, with respect to Count III of the third amended complaint is in all respects confirmed and Count III is dismissed without leave to amend.

AS TO COUNT IV OF THE THIRD AMENDED COMPLAINT:

The order of July 23, 1973, with respect to Count IV of the third amended complaint is in all respects confirmed and Count IV is dismissed without leave to amend.

AS TO COUNT I OF THE FOURTH AMENDED COMPLAINT:

This count, based on 42 U.S.C. § 1985 (2) and (3) presents a new legal theory and in my opinion,

if interpreted liberally, a claim for relief may be found in it. The pleading, however, does not comply with Rule 8(a) and with the previous orders of this court.

In 1971 Judge Boldt said:

> . . . When attorneys admitted to practice in Federal courts prepare complaints neither the Court nor opposing counsel should be required to expend time and effort searching through large masses of conclusory, argumentative, evidentiary and other extraneous allegations in order to discover whether the essentials of claims asserted can be found in such a melange. It is the duty and responsibility, especially of experienced counsel, to state those essentials in short, plain and non-redundant allegations. . . .
>
> --Memorandum Decision and Order Striking Complaint and Denying Temporary Restraining Order, filed July 2, 1971.

This statement is still pertinent. At some point a plaintiff owes some obligation to the court and to the defendants. At some time the reckless sweep should give way to the controlled thrust. In my opinion plaintiffs have had ample opportunity to state a claim as required by the rules; in my opinion they have failed, and in my opinion, solely as a matter of discipline, Count I of the fourth amended complaint should be dismissed without leave to amend.

IT IS THEREFORE ORDERED that the defendants and all of them have judgment against the plaintiffs and all of them and that the plaintiffs are denied all relief.

DATED this 30th day of August, 1973.

/s/ Russell E. Smith
Russell E. Smith
United States District Judge

1/ In my opinion the appeal does not deprive this court of jurisdiction since there has been neither final judgment nor a 28 U.S.C. §1292(b) certificate.

APPENDIX "F"

San Francisco Chronicle 15
Tues., Dec. 16, 1975

S.F. Doctor Wins a Long Lawsuit on Blackballing

After 13 years of lawsuits and legal maneuvering a local surgeon has won a damage suit against the San Francisco Medical Society for allegedly trying to ruin his practice and blackballing him at four hospitals.

Dr. Sanford W. Ascherman, the surgeon, won a total of $50,000 — $40,000 of it in punitive damages — against the medical society of which he has been a dues-paying member since 1959.

He also won $20,000 two weeks ago in a settlement of damage claims he made against the four hospitals that had ousted him from their staffs — French, Franklin, St. Joseph's and Marshal Hale Memorial, formerly known as Hahnemann Hospital.

A spokesman for the medical society here said the organization's officers had not yet decided whether to appeal the court verdict, which was returned Friday by a jury of six men and six women before Superior Court Judge John Ertola.

Ascherman has been a highly controversial figure in San Francisco medical circles ever since he became an outspoken advocate of Medicare and other government health programs in the early 1960s.

But even before that, as a young surgeon on the staff of Mount Zion Hospital, he had run afoul of that institution's leaders and was dropped from the staff there. He sued for reinstatement and lost, sued again and lost again. At the moment he has no suit pending against Mount Zion.

As a result of his political advocacy, he charged, the medical society here went after him in 1962. It dropped his name from the society's referral service, and blackballed him with local hospitals and a malpractice insurance company.

At the same time he was ousted from the staff of Marin General Hospital too. More than two years ago, however, the Marin hospital's directors reinstated him after ten years of lawsuits against that institution.

According to the settlement terms with the San Francisco hospitals, Ascherman will be permitted to apply for staff membership once again and will not be opposed, his lawyer, Bruce Lubarsky, said yesterday.

When he began his long litigation here, Ascherman asked for $6 million in damages. He lost, he appealed, he won a new trial, and then lost again after the trial jury deadlocked. After another appeal he won another trial, and finally, last Friday's damage award.

A THE HONOLULU ADVERTISER June 20, 1975

Protesting doctors intend to refuse Kona tourists

By BRUCE BENSON
Advertiser Staff Writer

Kona physicians on the Big Island have threatened to go on strike against tourists and other nonresidents by refusing to provide emergency-room services.

The Advertiser learned last night that most of the 10 doctors in the area have agreed to quit attending strangers at the Kona Hospital emergency room unless the State provides them with some form of protection against malpractice suits.

THREE Kona physicians gave different estimates of how many would adhere to the strike, but it appeared that at least half are serious.

Most of the rest appear to favor the limited walkout, set for July 1. But as members of a medical group, they reportedly will suspend their services to tourists and strangers only if their employer okays it.

Dr. Frank Ferren, a general surgeon and chief of staff at Kona Hospital, said: "About half of them go along. They want the State to cover them in an umbrella-type clause for anything above what their own malpractice insurance covers.

"They're willing to see their own patients in the emergency room, but they feel the tourists and the Mainlanders are a much higher-risk group."

THE BALKING physicians met last week with Henry N. Thompson, deputy director in charge of county-State hospitals. Thompson has agreed to report by July 1 what the State feels it can offer.

Dr. Alan Hubacker, an obstetrician-gynecologist, described the problem this way:

"The State refused to handle insurance for doctors, but the State maintains a hospital emergency-room service. The problem is that many tourists or people from out of town will come to the emergency room for care and they do not have a local physician. Who is going to take care of these people?

"It is the State's function or the physician's function to see those people? And, if we do take the chance, shouldn't the State cover us for seeing them, or else provide a special group of emergency physicians to see them?"

HUBACKER believes that the Kona doctors gave State official Thompson three options. Either provide malpractice insurance coverage, get another group of physicians to run the emergency room, or "else we would just quit the emergency room."

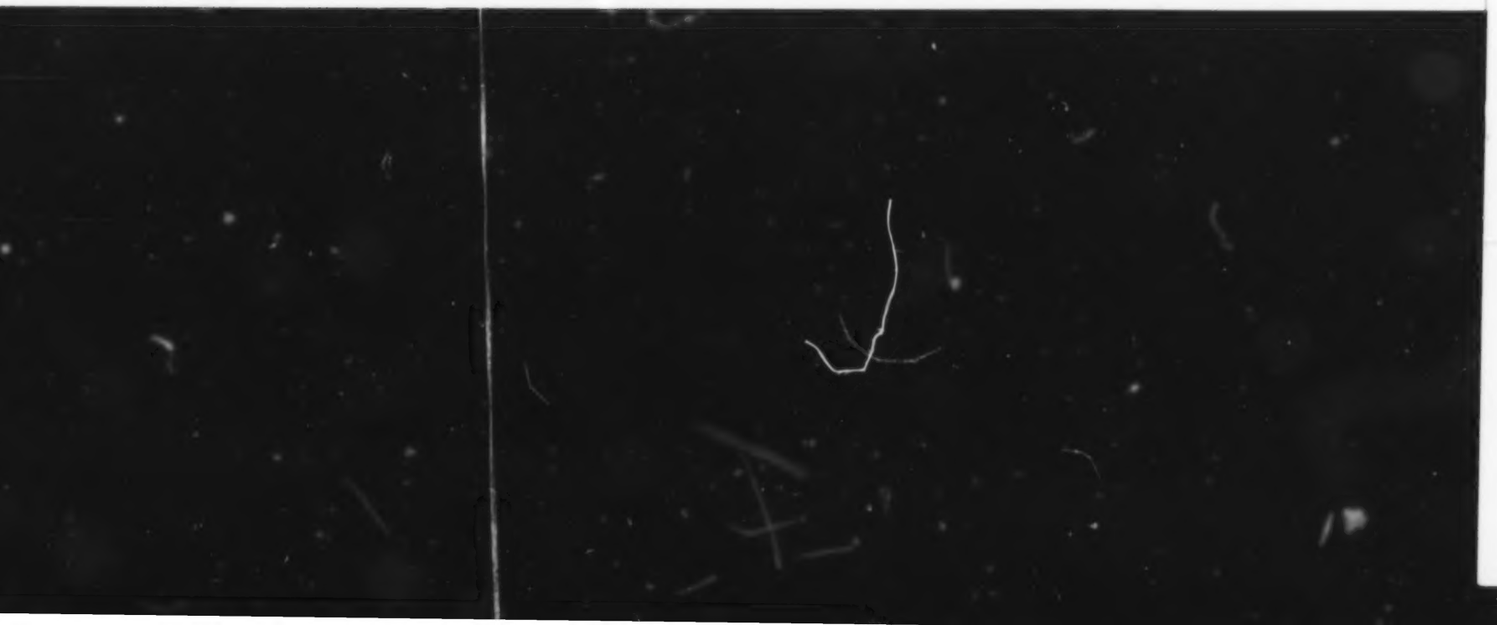
Thompson said last night that the State doesn't have a legal obligation to continue operating the emergency room, and that the doctors don't have a legal obligation to staff it either.

"There was a time when a physician was required to treat anybody and anyone who came to his door," Thompson said. "Legally today that physician has a legal right to refuse service."

Thompson said insurance companies have told him that they will not issue a policy to cover Kona's doctors for periods when they are attending the emergency room. Nor will they issue policies covering the doctors for "catastrophic" amounts above their own malpractice policies, said Thompson.

THE IMPENDING Kona strike was prompted by a string of malpractice suits by tourists, capped by a recent suit against one Kona physician for $5 million.

Dr. Hubacker and the other physicians stressed that they would continue to treat their local patients, whether the emergency room remains open or shut.



APPENDIX "G"

APPENDIX "H"

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Amendment I, United States Constitution

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment IV, United States Constitution

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated . . ."

Amendment V, United States Constitution

"No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . ."

Amendment VII, United States Constitution

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."

Amendment VIII, United States Constitution

"Excessive fines (shall not be) imposed, nor cruel and unusual punishment inflicted."

Amendment XIII, United States Constitution

"Section 1. Neither slavery nor involuntary

servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Amendment XIV, Section 1, United States Constitution

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

15 U.S.C., Section 15

"Suits by persons injured--Recovery of triple damages. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C., Section 26

"Injunctive relief for private parties--Exception. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against

threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this act [§§ 13, 14, 18, and 19 of this title], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven [49 § 1 et seq.] in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

18 U.S.C., Section 241

"Conspiracy against rights of citizens. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--

"They shall be fined not more than $10,000

or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

18 U.S.C., Section 242

"Deprivation of rights under color of law. Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

18 U.S.C., Section 371

"Conspiracy to commit offense or to defraud United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C., Section 1621

"Perjury generally. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C., Section 1622

"Subornation of perjury. Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both."

28 U.S.C., Section 2281

"Injunction against enforcement of State statute--Three-judge court required. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is

heard and determined by a district court of three judges under section 2284 of this title."

28 U.S.C., Section 2284

"Three-judge district court--Composition--Procedure. In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

. . .

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted

to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted."

42 U.S.C., Section 291, Public Health Service

"Declaration of purpose. The purpose of this title [42 USCS §§ 291-291o-1] is--

"(a) to assist the several States in the carrying out of their programs for the construction and modernization of such public or other nonprofit community hospitals and other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic, or similar services to all their people;

"(b) to stimulate the development of new or improved types of physical facilities for medical, diagnostic, preventive, treatment, or rehabilitative services; and

"(c) to promote research, experiments, and demonstrations relating to the effective development and utilization of hospital, clinic, or similar services, facilities, and resources, and to promote the coordination of such research, experiments, and demonstrations and the useful application of their results.

42 U.S.C., Section 1981

"Equal Rights Under the Law. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citi-

zens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C., Section 1982

"Property Rights of Citizens. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

42 U.S.C., Section 1983

"Civil Action for Deprivation of Rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C., Section 1985

"Conspiracy to Interfere With Civil Rights. First. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful

discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

"Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

"Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authori-

ties of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

42 U.S.C., Section 1986

"Action for Neglect to Prevent Conspiracy. Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [§ 1985 of this title], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefore, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

42 U.S.C., Section 2000a, Injunctive Relief Against Discrimination In Places of Public Accommodation

"Right to full and equal enjoyment of places of public accommodation--Definitions--(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title [§§ 2000a-2000a-6 of this title] if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

"(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located with-

in a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

. . .

"§ 2000a-1. Entitlement. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

. . .

"§ 2000d. Nondiscrimination in Federally assisted programs. No person in the United States

shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Rule 8(a), Federal Rules of Civil Procedure

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

Rule 8(f), Federal Rules of Civil Procedure

"(f) Construction of pleadings. All pleadings shall be so construed as to do substantial justice."

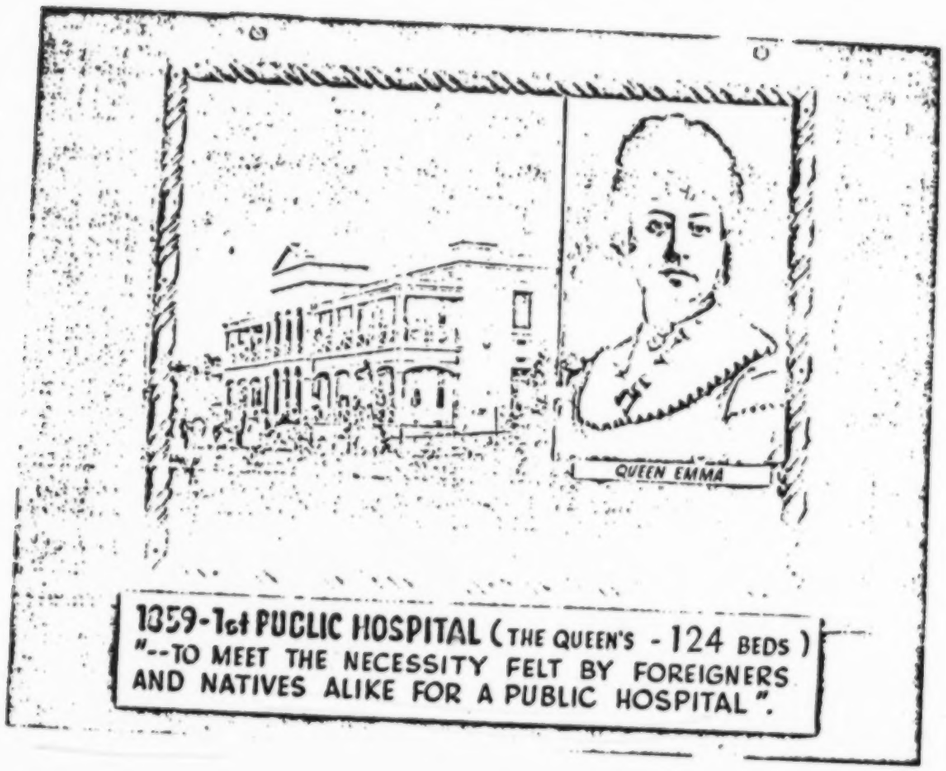
Rule 23(a), Federal Rules of Civil Procedure

"Class actions.--(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Rule 54(b), Federal Rules of Civil Procedure

"(b) Judgment upon multiple claims or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims of parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."